FEDERAL JUDICIARY: IS THERE A NEED FOR ADDITIONAL FEDERAL JUDGES?

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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FEDERAL JUDICIARY: IS THERE A NEED FOR ADDITIONAL FEDERAL JUDGES?

WEDNESDAY, JUNE 24, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith, (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

Today's oversight hearing is on the Federal Judiciary: Is There a Need for Additional Federal Judges?

The Subcommittee will review the proposal of the Judicial Conference of the United States for the creation of new Federal judgeships and the methodology upon which the proposal is based. The Judicial Conference biennially reviews the judgeship needs for all U.S. Courts of Appeal and U.S. District Courts. The Conference then submits its recommendations to Congress.

Today's hearing will focus on the Conference's March 2003 recommendations.

The Conference recommends that Congress create positions for 11 new Courts of Appeal judges, 46 new District Court judges, and to make permanent 5 temporary District Court judges. In developing judgeship recommendations, the Conference, through its committee structure, reviews District Court needs based in large part on the standards adopted in 1993 related to the caseload of judges. Every case filed in a District Court is assigned a weight. The weight represents the average amount of judge's time the case is expected to require. In Courts of Appeal nearly every case filed is assigned a weight of one because it is assumed that all cases have an equal impact on judges' workloads. When the annual weighted case filings per authorized judgeship in each court reach a certain level, the conference may consider requesting additional judgeships for that court.

The Conference also takes into account additional criteria that may influence judgeship needs, including senior judge and magistrate judge assistance, geographical factors and unusual caseload complexity.

In March I sent a letter to the Government Accounting Office requesting that it determine if the weighted and adjusted case filing systems accurately calculate the workload of judges. In its report

the GAO concluded that while the methodology used to develop the weights for District Court filings produced valid results, the weights were adopted in 1993 and based on data collected as long as 15 years ago. The GAO cautions that changes since 1993 may have affected whether the weights continue to be a reasonably accurate measure of the average time burden on District Court judges.

The Conference's Subcommittee on Judicial Statistics has approved a plan for updating its methodology, but the GAO has two concerns with the new approach. First, it would rely on data from two different case management data systems so it will be difficult to integrate the data from the two systems into reliable and useful analysis. Second, the plan will not require judges to actually document time spent on a case. Because of this, the GAO feels any assessment of case weights would not be objective.

With regard to judgeship needs on Courts of Appeal, the adjusted filings measure adopted in 1996 is similar to a measure the GAO reviewed in 1993. Neither measure is based on any data involving the actual judge time required by different types of cases in the Courts of Appeal.

In 1993 the GAO recommended that the Conference improve its workload measure for the Courts of Appeal specifically by requiring judges to document how they spend their time on cases. The GAO concluded that, quote, "Given the importance and cost of Federal judgeships, this would be a good investment to ensure that the workload measures that are used to support judgeship requests are reasonably accurate and based on the best data available using sound research methods," end quote.

My conclusion is that after 10 years it is disappointing that an accurate and objective methodology has not been developed by the Conference, especially considering the important work of Federal judges.

The gentleman from California, Mr. Berman, is recognized for his opening statement.

Mr. BERMAN. Thank you, Mr. Chairman, and I ask unanimous consent that my entire statement be included in the record, along with a letter from the Chief Judge of the Central District of California, Judge Consuelo Marshall.

Mr. SMITH. Without objection, both the opening statement and the letter to which you have referred will be made a part of the record, as will the opening statements of any Member of this Committee, as will the full written testimony of all of our witnesses today as well.

Mr. BERMAN. Well, Mr. Chairman, I'm pleased that you have decided to explore whether there is a need for creating new judgeships. The Judicial Branch understands things that Congress might not intuit on its own. For instance, the Judicial Branch recognizes that not all Federal courts are created equal, and some may have needs that are not adequately reflected in the methodology employed by the Judicial Conference.

In the District Court for the Central District of California, which happens to cover my congressional district, is one such Federal Court. Chief Judge Consuelo Marshall informs me that in recommending one new permanent and two new temporary judgeships

for the Central District, the Judicial Conference took into account compelling factors unique to the Central District. The Central District is the largest of the 94 Federal Districts in the Nation, serving a population of 17 million people. However, the Central District has only 27 authorized judgeships, meaning there is less than 1 judge for every 630,000 residents. Compare this to the Southern District of New York, which has 28 authorized judgeships serving a population of 4,871,000, or 1 judge for every 174,000 residents, a tremendous disparity.

Size is not the only thing that distinguishes the Central District. The Central District deals with more than its share of extremely complex cases. As Chief Judge Marshall states, our District handles many of the most complex criminal prosecutions in the country including business crimes, public corruption, gang-based RICO conspiracies and international narcotics and money laundering conspiracies. A large percent of the court's civil docket is comprised of intellectual property, antitrust, RICO and environmental cases. Such complex cases clearly take far more of a court's time than the average case. The methodology used by the Judicial Conference to make judgeship recommendations takes many of these complexities into consideration, but may not reflect all relevant factors. For example, Judge Marshall notes that under the current Judicial Conference methodology, large multiparty civil cases are given the same weight as single plaintiff and single defendant cases.

In conclusion, Mr. Chairman, I think many Federal Courts like the Central District of California, have serious needs for additional judgeships. I look forward to working with you, the GAO, and the Judicial Conference to determine the appropriate number the appropriate number of new judgeships for the Central District and other courts across the Nation, and I yield back the balance of my time.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

I am pleased that you have decided to explore whether there is a need for creating new judgeships.

Recently, as a late substitute for Chairman Sensenbrenner, I gave remarks before the American Academy of Arts and Sciences on the appropriate relationship between the judicial and legislative branches of government. The crux of my remarks was that it is appropriate for Congress to exercise its jurisdiction over administration of the judicial branch, but not appropriate to regulate the judicial function itself.

Determination of the appropriate number of federal judgeships is within the appropriate jurisdiction of Congress. While the number of judgeships clearly has an effect on the workload of existing judges, congressional control over the number of judgeships does not interfere with the exercise of the judicial function itself.

I commend you, Mr. Chairman, for recognizing this, and commissioning the GAO study before us today. This study will assist the Subcommittee and Congress in making a reasoned decision when determining whether to create new judgeships.

That does not mean Congress should exercise its jurisdiction without consulting the courts. In fact, I believe Congress should defer as much as possible to the courts in determining the number of federal judgeships. Clearly, the judicial branch is best situated to examine the strains that case loads place on the ability of judges to provide timely, well-reasoned opinions. Since the Judicial Branch is the expert in this area, we should start with a bias in favor of their judgeship recommendations.

The judicial branch understands things that Congress might not intuit on its own. For instance, the judicial branch recognizes that not all federal courts are created

equal, and some may have needs that are not adequately reflected in the methodology employed by the Judicial Conference.

The District Court for the Central District of California, which happens to cover my congressional district, is one such federal court. Chief Judge Consuelo Marshall informs me that, in recommending one new permanent and two new temporary judgeships for the Central District, the Judicial Conference took into account compelling factors unique to the Central District.

The Central District is the largest of the 94 federal districts in the nations, serving a population of 17 million people. However, the Central District has only 27 authorized judgeships, which means that there is less than one judge for every 630,000 residents. Compare this to the Southern District of New York, which has 28 authorized judgeships serving a population of 4, 871,000, or one judge for every 174,000 residents.

Size is not the only thing that distinguishes the Central District. The Central District deals with more than its share of extremely complex cases. As Chief Judge Marshall states, "Our district handles many of the most complex criminal prosecutions in the country, [including] business crimes; public corruption; gang-based RICO conspiracies; and international narcotics and money-laundering conspiracies. . . . A large percentage of the court's [civil] docket is comprised of intellectual property, antitrust, RICO, and environmental cases."

Such complex cases clearly take far more of a court's time than the average case. The methodology used by the Judicial Conference to make judgeship recommendations takes many of these complexities into consideration, but may not reflect all relevant factors. For example, Chief Judge Marshall notes that, under the current Judicial Conference methodology, "large multi-party civil cases [are] given the same weight as single plaintiff and single defendant cases."

In conclusion, Mr. Chairman, I think many federal courts, like the Central District of California, have serious need for additional judgeships. I look forward to working with you, the GAO, and the Judicial Conference to determine the appropriate number of new judgeships for the Central District and other courts across the nation.

I yield back the balance of my time.

[The letter of Chief Judge Marshall follows:]

United States District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012

Consuelo B. Marshall
Chief Judge

June 20, 2003

The Honorable Howard Berman
United States Representative
2330 Rayburn House Office Building
Washington, DC 20515

Dear Representative Berman:

Your office has informed me that the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property will hold an oversight hearing next week to discuss the Judicial Conference's recommendations for new federal judgeships. As you know, the overwhelming workload of California's district courts, including the Central District, has created an acute need for additional judgeships in our state. I write to share with you those factors, unique to the Central District, that the Judicial Conference found compelling in issuing its recommendation that the Central District receive one new permanent and two new temporary judgeships.

A. The Central District of California is the largest district in the nation, yet has fewer authorized judgeships, on a per resident basis, than many other districts.

The Central District of California, which alone sends 27 members to the House of Representatives, is by far the largest of the 94 federal districts in the nation. The 2002 census shows that more than 17 million residents – over half of California's population – live in this district's seven counties: Los Angeles; Orange; Riverside; San Bernardino; Ventura; Santa Barbara; and San Luis Obispo. The Central District currently has 27 authorized judgeships, which means that there is only one judge for every 630,358 residents. Although there is no other district of our size, comparison to other district courts supports additional judgeships for the Central District. For example, the Southern District of New York has 28 authorized judgeships, serving a population of 4,871,285. Therefore, in the Southern District of New York, there is one judge for every 173,974 residents. Similarly, the Northern District of Illinois and the Eastern District of Pennsylvania are each authorized for 22 judgeships, resulting in one judge per 470,316 and 239,686 residents, respectively.

B. While the Central District's weighted caseload alone supports additional judgeships, other factors, such as the complexity and types of cases routinely filed in the district, should be considered.

The weighted caseload of this district is currently 500 . This figure surpasses the 430 cases per judge determined by the Judicial Conference as being indicative of a district's need for a new judgeship. As recognized by the Committee on Judicial Resources' 2003 Biennial Survey of Judgeship Needs, it may also be necessary to consider other factors not reflected by the weighted caseload standard. The complexity of cases filed in the Central District is one such factor. While it is not feasible to describe every type of case handled in this district, what follows is a representative description of the diverse and complex cases regularly heard by our Court as a result of the district's unique cultural, ethnic, economic, and political composition.

Our district handles many of the most complex criminal prosecutions in the country: business crimes; public corruption; gang-based RICO conspiracies; and international narcotics and money laundering conspiracies, to provide just a few examples. Highly complex multiple-defendant and multiple-victim cases are the norm, as are cases with non-English speaking criminal defendants and witnesses. Several of our judges also currently have cases with multiple death eligible defendants. One of these cases consists of 40 defendants, 23 of which are death eligible. These types of cases result in more pretrial motions, lengthier hearings and longer trials. In fact, in 2002, this district had eight criminal trials lasting more than 16 days. The number and complexity of cases on our criminal docket continues to grow, with an expected increase in the number of complex criminal drug cases, capital habeas petitions, and capital prosecutions.

Our district's civil litigation is similarly complex. A large percentage of the court's docket is comprised of intellectual property, antitrust, RICO and environmental cases. These trials often last several weeks, and yet, when a judge is in the courtroom s/he is still responsible for hundreds of other pending cases, in which motions must be heard and resolved, applications for injunctions must be determined, settlement conferences must be conducted, etc. Meanwhile, new cases are still being filed, with large multi-party civil cases being given the same weight as single plaintiff and single defendant cases. Moreover, we project a 17% increase in complex civil case filings through December 2003.

In order to handle this steadily increasing caseload, the Central District has requested assistance from visiting judges. Judge Edward Shea from the Eastern District of Washington has accepted 282 related earthquake cases and three related Miller Act cases, and Judge Marsha Pechman from the Western District of Washington has accepted 21 related securities fraud class action cases. Judge Kram from the Southern District of New York recently sat in the Central District, extending her stay beyond its initial time frame because of the complexity of the matter being tried.

Please feel free to contact me should you require additional information regarding the Central District's judicial needs. On behalf of the Court, I thank you for your ongoing support and leadership on issues of concern to the judiciary. Any assistance you can provide in helping the Central District gain the one permanent and two temporary judgeships necessary to properly serve the citizens of Southern California, as recommended by the United States Judicial Conference, is greatly appreciated.

Thank you once again.

Sincerely,

Consuelo B. Marshall, Chief Judge

CBM:dmo

cc: The Honorable Mary M. Schroeder, Chief Judge
United States Court of Appeals for the Ninth Circuit
The Honorable Marilyn L. Huff, Chief Judge of the Southern District of California
Sherri Carter, District Court Executive
Aleck French, Counsel to Congressman Berman

Mr. SMITH. Thank you, Mr. Berman.

I do want to thank the Members who are present, both for their attendance and for their interest in such an important subject today, and as I mentioned a while ago, their opening statements will be made a part of the record.

Let me introduce our witnesses. Our first witness is the Hon. Dennis Jacobs, Judge of the United States Court of Appeals for the Second Circuit of New York. Judge Jacobs was appointed in 1992. He received his BA from Queens College at the City University of New York and his MA and JD from New York University.

Our next witness is William O. Jenkins, Jr., Director of Homeland Security and Justice Issues at the Government Accounting Office. Mr. Jenkins has been with the Government Accounting Office since 1979. He received his BA magna cum laude from Rice University, and his MA and Ph.D. in public law from the University of Wisconsin at Madison.

Our last witness is Professor Arthur D. Hellman of the Pittsburgh School of Law. Professor Hellman is a renowned scholar with expertise in the areas of Federal Courts and constitutional law. Professor Hellman received his BA magna cum laude from Harvard University, and his JD from Yale Law School.

We welcome you all, but before we go to your testimony I would like to recognize the gentlewoman from Pennsylvania, Ms. Hart, for any comment she may have about any witness who may be here.

Ms. HART. Don't worry, it's positive. Thank you, Mr. Chairman. I appreciate it. I don't want to take up a lot of time, but it is always very gratifying, as a Member of the House to have someone I know have the opportunity to come here and address a Committee and share his or her expertise, and we are so lucky today. I am a graduate of the University of Pittsburgh School of Law, and I am friends with our witness, Arthur Hellman. He has been very well respected, as I know firsthand both as a student at the law school and also, obviously, within the community.

One thing that is important to note, and aside from the wonderful degrees list and his accomplishments and the books he has authored, is the fact that he is a great guy, very involved in the community, and somebody who has an interest in the political process. As we know, too often people are very busy, especially in academia, and don't take as much of an interest in what we do here as Art Hellman does, and I want to thank him for that and welcome him in joining us today to share with us his views on this issue.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Ms. Hart.

Judge Jacobs, we'll begin with you, if we may.

STATEMENT OF JUDGE DENNIS JACOBS, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OF NEW YORK

Judge JACOBS. Mr. Chairman, Members of the Subcommittee, I'm Dennis Jacobs, Circuit Judge for the Second Circuit of Appeals and Chair of the Judicial Conference Committee on Judicial Resources.

That committee is responsible for all issues of human resource administration in the U.S. Courts of Appeals and the District Courts, including the need for Article III judges and support staff. I'm here today to provide information about outstanding judgeship

needs and the process by which the Judicial Conference of the United States ascertains those needs.

On March 20 the Director of the Administrative Office of the U.S. Courts transmitted to the President of the Senate and to the Chairmen of the House and Senate Judiciary Committees, a bill containing the recommendations of the Judicial Conference to create the judgeships that the Chair has summarized earlier. For many of these courts the recommendations reflect needs that have arisen or have become acute since the last comprehensive judgeship bill was enacted in 1990. In developing these recommendations for additional Circuit and District judgeships, the Conference uses a formal systematic and rigorous process. The Judicial Conference conducts a new survey of judgeship needs every 2 years and we go through the same process each time.

Each court that requests an additional judgeship submits a detailed justification to my committee's Subcommittee on Judicial Statistics. And after review of that submission, the subcommittee sends preliminary recommendations to the courts and to the appropriate circuit judicial councils and solicits views. The subcommittee then reviews the responses received from the Court and the recommendations of the judicial council in the light of updated caseload data and submits its recommendation to the full committee. The recommendations of the Committee on Judicial Resources are then provided to the Judicial Conference. The judgeships proposed in the draft bill were given final approval by the conference. A more detailed description of the process and the standards used is included in my prepared statement.

The Judiciary has conscientiously taken measures to reduce our requests to Congress for additional judgeships, and among the measures we have taken are requests for temporary rather than permanent judgeships where that suffices, services of senior judges and magistrate judges, intercircuit and intracircuit assignment of judges, the use of alternative dispute resolution, the use of new technology such as video conferencing, rigorous standards for evaluating judgeship needs so that we don't ask unless we need, and recommendations that vacancies not be filled in courts with consistently low workload. As part of the judgeship survey, courts requesting additional judgeships are questioned about their efforts to make use of all available resources.

Notwithstanding all these efforts, the workload needs in many courts cannot be met with the present complement of judges. Since the last comprehensive judgeship bill was enacted, workload has increased fairly relentlessly. No new circuit judgeship has been created since 1990, yet filings from then to March of this year in the Courts of Appeals have grown by 41 percent. The national average caseload for a 3-judge panel has reached 1,090, the highest ever. Since 1990 District Court filings rose 29 percent and in that time 34 additional district judgeships have been created in response to particular exigencies in particular districts. But even so, the average nationwide weighted filings per judgeship stands at 523, which is well above the Conference standard for considering recommendations for additional judgeships. This overall average is high. In the courts as to which judgeships are requested, in the draft bill the situation is downright alarming. As of March 2003 all but three of

those courts had weighted filings in excess of 500 per judgeship, 8 of these courts had per judgeship filings exceeding 600.

The Conference recognizes that there cannot be indefinite growth in judgeships. The long-range plan for the Federal Courts emphasizes that growth must be limited to the number of new judgeships that is necessary to exercise Federal jurisdiction. The Conference has a demonstrated commitment to controlling growth and has requested far fewer judgeships than the caseload increases would justify.

On behalf of the Judicial Conference, I request that this sub-Committee give full and favorable consideration to the draft submitted by the Judicial Conference. I am grateful for your willingness to consider this issue in this hearing, and I will be happy to respond to any questions you may have.

[The prepared statement of Judge Jacobs follows:]

PREPARED STATEMENT OF JUDGE DENNIS JACOBS

Mr. Chairman and members of the Subcommittee, I am Dennis Jacobs, Circuit Judge for the Second Circuit Court of Appeals and Chair of the Judicial Conference Committee on Judicial Resources. That Committee is responsible for all issues of human resource administration, including the need for Article III judges and support staff in the U.S. courts of appeals and district courts. I am here today to provide information about the judgeship needs of the courts and the process by which the Judicial Conference of the United States (the "Conference") ascertains those needs.

Every other year, the Conference conducts a survey of judgeship needs of all U.S. courts of appeals and U.S. district courts. The latest survey was completed in March 2003. Consistent with that survey, the Conference recommended that Congress establish 57 new judgeships in the courts of appeals and district courts. The Conference also recommended that five temporary district court judgeships created in 1990 be established as permanent positions. Appendix 1 contains the particular recommendation as to each court.

For many of the courts, the recommendations reflect needs developed since the last comprehensive judgeship bill was enacted, in 1990. Every two years since then, the Conference has submitted to Congress recommendations on the numbers of additional Article III judgeships required in the judicial system.

SURVEY PROCESS

In developing recommendations for consideration by Congress, the Conference (through its committee structure) uses a formal process to review and evaluate Article III judgeship needs. The Committee on Judicial Resources and its Subcommittee on Judicial Statistics manage these reviews; the final recommendations on judgeship needs are adopted by the Conference itself. Before a recommendation is transmitted to Congress, it undergoes consideration and review at six levels within the Third Branch, by: 1) the judges of the court making a request; 2) the Subcommittee on Judicial Statistics; 3) the judicial council of the circuit in which the court is located; 4) the Subcommittee, in a further and final review; 5) the Committee on Judicial Resources; and 6) the Conference. In the course of the 2003 survey, the courts requested 80 additional judgeships, permanent and temporary. Fifteen new judgeships were created in the 21st Century Department of Justice Appropriations Authorization Act. Our review procedure reduced the number of judgeships recommended by the Conference to 57.

In the course of each judgeship survey, all recommendations made in the prior survey are re-considered, taking into account the latest workload data, changes in the availability of resources, and adjustments to guidelines for evaluating requests. In some instances, this review prompts adjustments to previous recommendations.

JUDICIAL CONFERENCE STANDARDS

The recommendations developed through the review process described above are based in large part on a numerical standard based on caseload. These standards, provided at Appendix 2, are not in themselves indicative of each court's needs. They represent the caseload at which the Conference may begin to consider requests for additional judgeships—the starting point in the process, not an end point.

Caseload statistics must be considered and weighed with other court-specific information to arrive at a sound measurement of each court's judgeship needs; circumstances that are unique, transitory, or ambiguous may result in an overstatement or understatement of actual burdens. The Conference process therefore takes into account additional factors, including: the number of senior judges, their ages and level of activity; magistrate judge assistance; geographical factors, such as the number of places of holding court; unusual caseload complexity; temporary or prolonged caseload increases or decreases; use of visiting judges; and any other factors noted by individual courts (or identified by the Statistics Subcommittee) as having an impact on resource needs. Courts requesting additional judgeships are specifically asked about their efforts to make use of all available resources. (See Appendix 3.)

For example, the standard used by the Conference as its starting point in the district courts is 430 weighted filings per judgeship. But in every district court as to which the Conference recommended an additional judgeship in March 2003, the workload is at 489 weighted filings and above. In all but three of those district courts, weighted filings per judgeship exceed 500.

In the courts of appeals, the starting point used by the Conference is 500 adjusted filings per panel. In 2003, four circuits exceeded 900 adjusted filings per panel; even so, two of these courts did not request an additional judgeship. The case mix in the circuits in which additional judgeships are recommended differs significantly from the case mix in the circuit courts that did not request additional judgeships. For example, criminal and prisoner petition appeals were approximately 60 percent of all appeals filed in the Fifth and Eleventh Circuits (which did not seek additional judgeships), but only about 35 percent in the Second and Ninth Circuits (which did). In each circuit court as to which the Conference has recommended additional judgeships, the caseload levels substantially exceed the standard, and other factors bearing on workload have been closely considered.

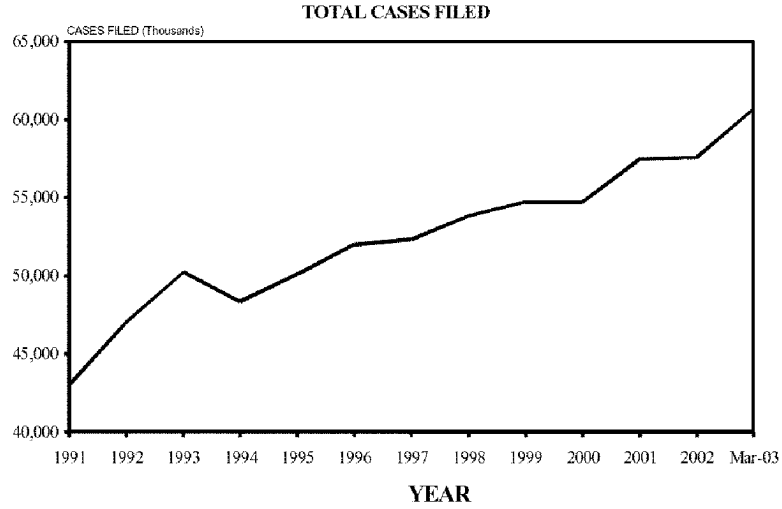
In short, caseload statistics furnish the threshold for consideration, but the process entails a searching and critical look at the caseloads in light of many other considerations and variables, some of which are subjective and all of which are considered together.

BACKGROUND-CASELOAD INFORMATION

The last comprehensive judgeship bill for the U.S. courts of appeals and district courts was enacted in 1990.[1] Public Law 101–650 established 11 additional judgeships for the courts of appeals and 74 additional judgeships for the district courts. Since that time, caseloads in the courts of appeals and the district courts have continued to rise.

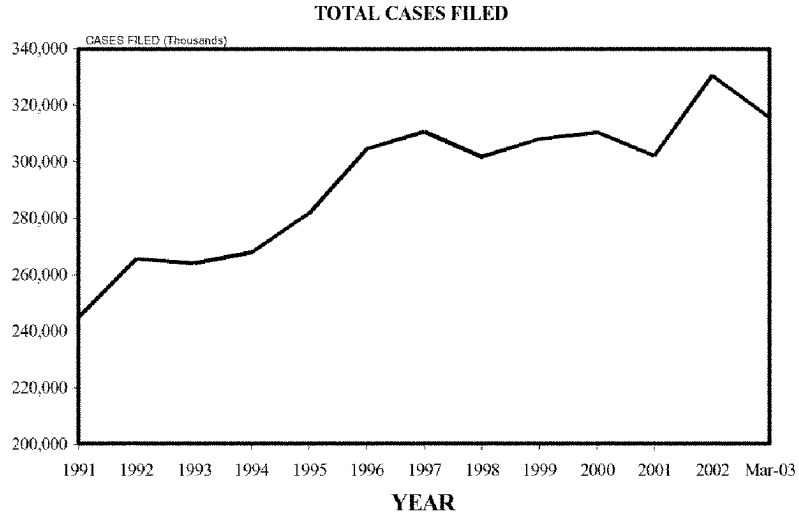
[1] As part of the Judiciary's appropriation for fiscal years 2000 and 2001, and as part of the Department of Justice authorization bill in fiscal year 2003, the Congress created 9, 10, and 15 judgeships, respectively.

CHART 1. U.S. COURTS OF APPEALS



By March 2003, filings in the courts of appeals had grown by 41 percent (Chart 1), while case filings in the district courts rose 29 percent (civil cases were up 22 percent while criminal felony filings rose 73 percent) (Chart 2). Although Congress created 34 additional judgeships in the district courts in recent years in response to particular problems in certain districts, no additional judgeship has been created for the courts of appeals. As a result, the national average caseload per three-judge panel has reached 1,090—the highest ever. Were it not for the assistance provided by senior and visiting judges, the courts of appeals would not have been able to keep pace, particularly in light of the number and length of vacant judgeships.

CHART 2. U.S. DISTRICT COURTS



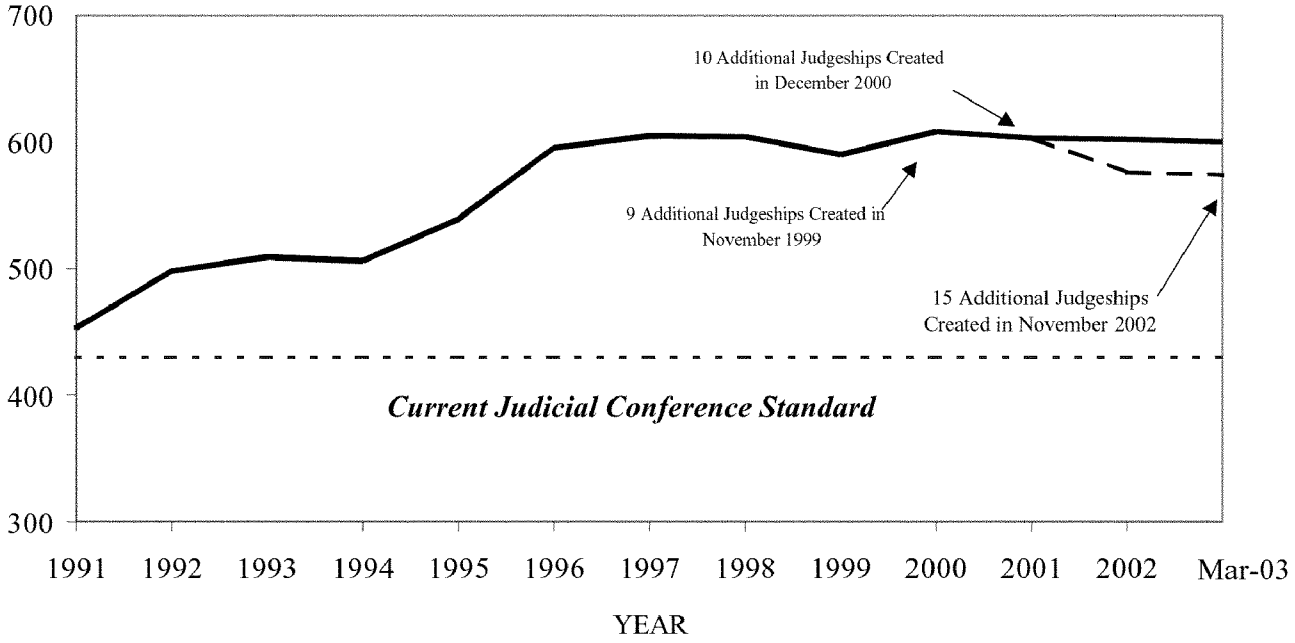
Even with the additional district judgeships, the number of weighted filings per judgeship in the district courts has reached 523—well above the Judicial Conference standard for considering recommendations for additional judgeships. I have provided at Appendix 4 a more detailed description of the most significant changes in the caseload since 1991.

One important factor bearing on workload in the district courts, which may not be obvious from the caseload data, is the change in the nature of the criminal business. Since 1991, the conviction rate for criminal defendants has grown from 82 percent of all defendants to 90 percent in 2003. Thus even without an increase in the district court caseload, there has been an increase in workload attributable to sentencing. In 2003, there were 70,585 sentencing hearings. This burden is intensified by the Sentencing Guidelines, which require more of a judge's time than discretionary sentencing did in the past.

Another factor that increases workload on criminal cases is the number of defendants receiving terms of supervised release following a prison term. The Sentencing Reform Act of 1984, which authorized sentences of supervised-release, imposed on district judges and magistrate judges responsibilities for a class of defendants who previously were the responsibility of the United States Parole Commission. Monitoring these defendants and reviewing potential violations of the terms of release are functions now performed by the district court. A large majority of defendants under supervision of the Federal Probation System are now serving terms of supervised release, so judges must now conduct hearings whenever these defendants violate the terms of their supervision. The incremental workload associated with supervised release is reflected in the weighted filings information used to support the need for additional judgeships, but that data has been folded in only recently. So the recommendations understate this additional workload burden of the district courts. We do know, however, that district court judges conducted approximately 15,000 such hearings in 2003. Again, without the assistance of senior and magistrate judges (and visiting judges), the district courts would not have been able to manage the workload increases.

Although the national figures provide a general indication of system-wide changes, the situation in courts where the Conference has recommended additional judgeships is much more dramatic. For example, there are eight district courts with caseloads exceeding 600 per judgeship. The district courts in which the Conference is recommending additional judgeships (viewed as a group) have seen a growth in weighted filings per judgeship from 453 in 1991 to 600 in March 2003 (or 574 per judgeship taking into account the 34 newly created judgeships)—an increase of 32 percent (Chart 3).

CHART 3.
WEIGHTED FILINGS PER JUDGESHIP IN DISTRICTS WITH RECOMMENDATIONS FOR ADDITIONAL JUDGESHIPS



The national data and the combined data for courts requesting additional judgeships provide general information about the changing volume of business in the courts. The Conference's recommendations are not, however, premised on this data concerning courts as a group. Judgeships are authorized court-by-court rather than nationally; so the workload data most relevant to the judgeship recommendations are those that relate to

each specific court as to which the Conference has recommended an additional judgeship.

Appendix 1 contains summary information about the numbers of additional judgeships recommended by the Conference for each court. The Legislative Affairs staff of the Administrative Office of the U.S. Courts has previously provided to each member of the Judiciary Committee the detailed justifications for the additional judgeships in each court. This material is too voluminous to attach as an appendix to this statement.

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for evaluating and recommending judgeship needs in response to both judiciary and congressional concerns. The Conference does not recommend (or wish) indefinite growth in the number of judges. The Long Range Plan for the Federal Courts (Recommendation 15) recognizes that growth in the judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction. However, as long as federal court jurisdiction continues to expand, there must be a sufficient number of judges to properly serve litigants and justice. The Conference is perennially attempting to balance the need to control growth and the need to seek resources that are appropriate to the workload. In an effort to implement that policy, we have requested far fewer judgeships than the caseload increases would suggest are now required.

On behalf of the Judicial Conference, I request that this Subcommittee give full and favorable consideration to the draft bill submitted by the Judicial Conference to establish 11 additional judgeships for the U.S. courts of appeals and 46 additional judgeships for the U.S. district courts.

APPENDIX 1

TABLE 1. ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE
2003

CIRCUIT/DISTRICT	AUTHORIZED JUDGESHIPS*	JUDICIAL CONFERENCE RECOMMENDATION
U.S. COURTS OF APPEALS		**9P, 2T**
FIRST	6	1P
SECOND	13	2P
SIXTH	16	1P
NINTH	28	5P, 2T
U.S. DISTRICT COURTS		**29P, 17T, 5T/P**
ALABAMA, NORTHERN	8	1P
ALABAMA, MIDDLE	3	1P
ARIZONA	13	3P
CALIFORNIA, NORTHERN	14	1P, 1T
CALIFORNIA, EASTERN	7	3P, T/P
CALIFORNIA, CENTRAL	28	1P, 2T
CALIFORNIA, SOUTHERN	13	2P, 3T
COLORADO	7	1T
FLORIDA, MIDDLE	15	2P, 1T
FLORIDA, SOUTHERN	18	4P
HAWAII	4	T/P
IDAHO	2	1T
ILLINOIS, NORTHERN	22	1T
INDIANA, NORTHERN	5	1T
INDIANA, SOUTHERN	5	1T
IOWA, NORTHERN	2	1T
KANSAS	6	T/P
MISSOURI, EASTERN	8	T/P
MISSOURI, WESTERN	6	1P
NEBRASKA	4	T/P
NEW MEXICO	7	2P, 1T
NEW YORK, EASTERN	15	3P, 1T
NEW YORK, WESTERN	4	1T
OREGON	6	1P
SOUTH CAROLINA	10	1P
UTAH	5	1T
VIRGINIA, EASTERN	11	2P
WASHINGTON, WESTERN	7	1P

P = PERMANENT
T = TEMPORARY
T/P = TEMPORARY MADE PERMANENT

* Includes judgeships authorized by P.L. 107-273, although the judgeships do not become effective until July 15, 2003.

APPENDIX 2

JUDICIAL CONFERENCE PROCESS FOR COURTS OF APPEALS

At its September 1996 meeting, on the recommendation of the Judicial Resources Committee, which consulted with the chief circuit judges, the Judicial Conference unanimously approved a new judgeship survey process for the courts of appeals. Because of the unique nature of each of the courts of appeals, the Conference process involves consideration of local circumstances that may have an impact on judgeship needs. In developing recommendations for courts of appeals, the Conference takes the following general approach:

A. Courts are asked to submit requests for additional judgeships provided that at least a majority of the active members of the court have approved submission of the request; no recommendations for additional judgeships are made without a request from a majority of the members of the court.

B. Each court requesting additional judgeships is asked to provide a complete justification for the request, including the potential impact on its own court and the district courts within the circuit of not getting the additional judgeships. In any instance in which a court's request cannot be supported through the standards noted below, the court is requested to provide supporting justification as to why the standard should not apply to its request.

C. The Conference considers various factors in evaluating judgeship requests, including a statistical guide based on a standard of 500 filings (with removal of reinstated cases) per panel and with pro se appeals weighted as one third of a case. This caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Conference **does not** attempt to bring each court in line with this standard.

The process allows for discretion to consider any special circumstances applicable to specific courts and recognizes that court culture and court opinion are important ingredients in any process of evaluation. The opinion of a court as to the appropriate number of judgeships, especially the maximum number, plays a vital role in the evaluation process, and there is recognition of the need for flexibility to organize work in a manner which best suits the culture of the court and satisfies the needs of the region served.

JUDICIAL CONFERENCE PROCESS FOR DISTRICT COURT REVIEWS

In an ongoing effort to control growth, in 1993, the Conference adopted new, more conservative criteria to evaluate requests for additional district judgeships, including an increase in the benchmark caseload standard from 400 to 430 weighted cases per judgeship. Although numerous factors are considered in looking at requests for additional judgeships, the primary factor for evaluating the need for additional district judgeships is the level of weighted filings. Specifically, the Conference uses a case weighting system [1] designed to measure judicial workload, along with a variety of other factors, to assess judgeship needs. The Conference reviews all available data on the caseload of the courts and supporting material provided by the individual courts and judicial councils of the circuits, and takes the following approach in developing recommendations for additional district judgeships:

A. A level of weighted filings in excess of 430 per judgeship is used as a starting point for considering requests; this caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Conference does not attempt to bring each court in line with this standard.

B. The caseload of the individual courts is reviewed to determine if there are any factors present to create a temporary situation that would not provide justification for additional judgeships. Other factors are also considered that would make a court's situation unique and provide support either for or against a recommendation for additional judgeships.

C. The Conference reviews the requesting court's strategies for handling judicial workload, including a careful review of each court's use of senior judges,

[1] "Weighted filings" is a mathematical adjustment of filings, based on the nature of cases and the expected amount of judge time required for disposition. For example, in the weighted filings system for district courts, each student loan civil case is counted as only 0.031 cases while each cocaine distribution defendant is counted as 2.27 weighted cases. The weighting factors were developed on the basis of time studies conducted by the Federal Judicial Center on cases filed between 1987 and 1991.

magistrate judges, and alternative dispute resolution, in addition to a review of each court's use of and willingness to use visiting judges. These factors are used in conjunction with the caseload information to decide if additional judgeships are appropriate, and to arrive at the number of additional judgeships to recommend for each court.

D. The Conference recommends temporary judgeships in all situations where the caseload level justifying additional judgeships occurred only in the most recent years, or when the addition of a judgeship would place a court's caseload close to the guideline of 430 weighted filings per judgeship. The Conference sometimes relaxes this approach in the case of a small court, where the addition of a judgeship would drop the caseload per judgeship substantially below the 430 level. In some instances the Conference also considers the pending caseload per judgeship as a factor supporting an additional temporary judgeship.

APPENDIX 3

ACTIONS TO MAXIMIZE USE OF JUDGESHIPS

In addition to the conservative and systematic processes described in pages 1–5 for evaluating judgeship needs, given the current climate of fiscal constraint, the judiciary is continually looking for ways to work more efficiently without additional resources. As a part of the normal judgeship survey process or as a separate initiative, the judiciary has used a variety of approaches to maximize the use of resources and to ensure that resources are distributed in a manner consistent with workload. These efforts have allowed us to request fewer additional judgeships than the increases in caseload would suggest are required. Among the more significant methods in use are:

(1) Surveys to review requests for additional permanent and temporary judgeships and extensions or conversions of temporary judgeships to permanent: As described previously, surveys are conducted biennially of all Article III judgeships needs. To reduce the number of additional judgeships requested from Congress, the Judicial Conference has adopted more conservative criteria for determining when to recommend creation of additional judgeships in the courts of appeals and district courts.

(2) Recommending temporary rather than permanent judgeships: Temporary, rather than permanent, judgeships are recommended in those instances where the need for additional judgeships is demonstrated, but it is not clear that the need will exist permanently.

(3) Development of a process to recommend not filling vacancies: In March 1997, the Judicial Conference approved a process for reviewing situations where it may be appropriate to recommend elimination of a district judgeship or that a vacancy not be filled. The Judicial Conference includes this process in its biennial surveys of judgeship needs for recommending to the Executive and Legislative Branches that specific vacancies be eliminated or not be filled. A similar process has been developed and is in use for the courts of appeals.

(4) Use of senior judges: Judicial officer resource needs are also met through the use of Article III judges who retire from active service to senior status. Most senior Article III judges perform substantial judicial duties; over 375 senior judges are serving nationwide.

(5) Shared judgeships: Judgeship positions have been shared to meet the resource needs of more than one district without the cost of an additional judgeship.

(6) Intercircuit and intracircuit assignment of judges: To furnish short-term solutions to disparate judicial resource needs of districts within and between circuits, the judiciary uses intercircuit and intracircuit assignments of Article III judges. This program has the potential to provide short-term relief to understaffed courts.

(7) Use of magistrate judges: Magistrate judges serve as adjuncts to the district courts, supplementing the work of the Article III judges. Use of magistrate judges on many routine court matters and proceedings allows for more effective use of Article III judges on specialized court matters.

(8) Use of alternative dispute resolution: Since the late 1970s and with increasing frequency, courts use various alternative dispute resolution programs such as arbitration, mediation, and early neutral evaluation as a means of settling civil disputes without litigation.

(9) Use of technology: The judiciary continually explores ways to help align caseloads through technological advancements, where judges can assist other districts or circuits without the need to travel.

APPENDIX 4

CASELOAD CHANGES SINCE LAST JUDGESHIP BILL

With the creation of 34 additional district court judgeships, the total number of authorized district court judgeships has increased 5 percent since 1991; court of appeals judgeships have not increased. Since the last comprehensive judgeship bill was enacted for the U.S. courts of appeals and district courts, the numbers of cases filed in those courts have grown by 41 percent and 29 percent, respectively. Specific categories of cases have seen dramatic changes over the last 12 years, some increasing and some decreasing significantly. Following is a summary of the most significant changes.

U.S. COURTS OF APPEALS *(Change in authorized judgeships: 0)*

- The total number of appeals filed has grown by more than 17,600 cases since 1991.
- Appeals of decisions in civil cases from the district courts have increased 25 percent.
- The most dramatic growth in civil appeals has been in prisoner appeals where case filings are up 63 percent since 1991; this growth has occurred in matters involving both state and federal prisoners.
- Appeals of criminal cases have risen moderately since 1991, increasing 13 percent overall.
- The number of appeals involving administrative agency decisions has fluctuated over the last several years, but is now more than three times the number filed in 1991, with most of that increase occurring in the past year. The increase in 2003 resulted from dramatic increases in the Ninth and Second Circuits in the number of appeals related to deportation orders.
- Original proceedings rose from 609 in 1991 to 3,659 in 2003. The Antiterrorism and Effective Death Penalty Act, enacted April 1996, requires prisoners to seek permission from courts of appeals for certain petitions. Data for these types of proceedings were not reported until October 1998. Between 1999 and 2003, original proceedings filings rose 8 percent.

U.S. DISTRICT COURTS *(Change in authorized judgeships: +5%)*

CIVIL CASELOAD

- Total civil filings rose 22 percent from 1991 to 2003, although the number of civil cases filed in 2003 was 6 percent below the number filed in 1997.
- The increase in civil filings resulted primarily from cases related to personal injury product liability (125%), social security (114%), civil rights (103%), copyright, patent and trademark (62%), and prisoner petitions (32%).
- Personal injury product liability filings rose 200 percent from 1991 to 1997 due primarily to breast implant cases and a large number of cases filed in the Middle District of Louisiana related to an oil refinery explosion. Personal injury product liability filings began to decline in 1998 and had fallen to nearly 1991 levels by 2001. In 2002, these cases more than tripled due to a large number of plaintiffs seeking relief in the expectation that new laws may be enacted making it more difficult to file cases related to injuries involving asbestos. A significant increase in filings involving the anti-cholesterol drug Baycol also contributed to the increase. Filings declined significantly in 2003, as asbestos filings fell sharply to below the number filed in 1991, but remained at twice the number filed in 2001.
- Some of the increases in civil filings resulted, in part, from legislative actions:
  - civil rights filings increased steadily after the Civil Rights Act of 1990 was enacted. Filings rose from 19,892 in 1991 to 43,278 in 1997, but have since decreased slightly.
  - prisoner petitions increased through the first half of the 1990's, rising 61 percent between 1991 and 1996. The increase was due primarily to a 57 percent increase in prison civil rights cases, although habeas corpus petitions were also higher. Prison litigation reform was enacted in 1996, and

prison civil rights cases have since fallen 40 percent and are now below 1991 levels. Habeas corpus petitions, on the other hand, have increased 46 percent and are now nearly twice the number filed in 1991. Overall, prisoner petitions increased 32 percent between 1991 and 2003.

- Filings related to social security fluctuated considerably between 1991 and 1996, but have risen sharply since 1999 and are now 114 percent above the number of cases filed in 1991. The recent increases in social security filings have resulted from a change in the processing of backlogged cases by the Social Security Administration.
- Copyright, patent, and trademark cases filed rose every year between 1991 and 2000, with the exception of a small decline in 1995, increasing 68 percent in that time. Since 2000, filings have declined 4 percent due to a 16 percent drop in trademark cases.
- Most of the significant decreases in filings from 1991 to 2003 occurred in case categories that have a relatively small number of cases. The most significant exception is recovery of overpayments and enforcement of judgments cases. Recovery cases rose sharply between 1995 and 2000, but have since fallen sharply and are now approximately 7,000 cases below the number filed in 1991. Other significant decreases occurred in personal injury cases not related to product liability—down 3,700 filings, forfeiture and penalty filings—down 3,400 filings, and property foreclosures which fell 1,900 filings.

CRIMINAL FELONY CASELOAD

- Since 1991, the number of criminal felony case filings has increased 73 percent and the number of felony defendants is 54 percent higher. After fluctuating between 1991 and 1994, criminal filings have steadily increased in the last nine years. Just since 1994, criminal felony case filings are up 87 percent.
- The largest increase by far has been in immigration filings, which rose from 2,000 in 1991 to 14,476 in 2003.
- Firearms filings fluctuated between 1991 and 1997, but have risen 166 percent just since 1997 and are currently 120 percent above 1991 levels.
- Drug-related filings increased 56 percent and defendants charged with drug offenses rose 34 percent.
- Although filings related to fraud fluctuated over the years, they have increased 37 percent from 6,029 to 8,248.
- Most of the significant decreases in filings occurred in offense categories that have a relatively small number of cases.

Mr. SMITH. Thank you, Judge Jacobs.
Director Jenkins.

STATEMENT OF WILLIAM O. JENKINS, DIRECTOR, HOMELAND SECURITY AND JUSTICE ISSUES, GENERAL ACCOUNTING OFFICE

Mr. JENKINS. Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to discuss the results of our review and assessment of the case-related workload measures the Judicial Conference had adopted for District Court and Courts of Appeals Judges, weighted case filings and adjusted case filings respectively.

In assessing the needs for additional judgeships the Judicial Conference begins with these quantitative workload measures and relies on them to be reasonably accurate measures of case-related judge workload. Whether they are in fact reasonably accurate measures depends in turn on the soundness of the methodology used to develop them. In assessing judgeship needs the Judicial Conference also considers a variety of other information, such as temporary increases or decreases in case filings specific to individual courts. I wish to emphasize that our analysis and my testimony are limited to an assessment of the workload measures themselves. The scope of our work did not include how the Judicial Con-

ference used these workload measures and other information to develop its current request for additional District and Courts of Appeals judgeships.

The case-related workloads measure is used for District Courts and Courts of Appeals recognized to different degrees, that the time demands on judges are largely a function of the number and complexity of the cases on their dockets. Some cases take more time than others. Generally each case filed in a District Court is assigned a case weight based on the subject matter of the case. The weight represents the relative national average amount of judge time the case would be expected to require. A case with the weight of 2.0, for example, would be expected to take twice as much judge time as a case with the weight of 1.0. Criminal felony cases are assigned on a per defendant basis. Total weighted filings for a District is the sum of weights of all cases filed in the District during a year. Weighted filings per authorized judgeship is the total weighted filings divided by the number of authorized judgeships. Generally the Judicial Conference considers weighted case filings of 430 or more per authorized judgeship as an indicator that a District Court may need one or more additional judgeships.

As approved in 1993, weighted filings are a reasonably accurate measure of District Judge case related workload. The methodology used to develop the weights included a valid sampling procedure, used actual case-related judge time from a sample of about 12,000 cases to develop the weights, and included a measure, standard errors, of the statistical confidence in the final weight for each case type. The weights are now 10 years old and changes in case characteristics and case management may have affected how accurately the weights continue to measure the judge time required for a specific volume and mix of cases.

The Subcommittee on Judicial Statistics has approved a research design for updating the current weights that would not require a new time study. Although the design appears to offer the benefit of reduced judicial burden, potential cost savings and reduced calendar time to develop the new weights, we are concerned that it would not be possible to objectively, statistically assess the accuracy of the weights resulting from the study. In developing the new weights, estimates of non-courtroom judge time, the majority of time judges spend on most cases, would be based on the results of an introduced set of structured, guided discussions among groups of experienced District Court Judges, about 124 in all.

The accuracy of the time estimates resulting from these discussions is dependent upon the experience and knowledge of the participating judges and the accuracy and reliability of the judges' recall about the time required for various case processing events in different types of cases. These consensus data cannot be used to develop an objective, statistical measure of the accuracy of the new case weights. We believe that any new case weight study should permit a statistical estimate of the accuracy of the new case weights, weights on whose accuracy the Judicial Conference will rely in assessing future judgeship needs.

For the Courts of Appeals, adjusted case filings is the principal quantitative case-related workload measure the Judicial Conference uses to assess the need for additional judgeships. The Con-

ference considers 500 adjusted filings for a three-judgeship panel as an indicator that one or more additional judgeships may be needed. Adjusted filings basically assumes that all cases filed in a Court of Appeals have an equal effect on judges' time with two exceptions. First, cases refiled and approved for reinstatement are not included in adjusted filings. They are deducted from the total. Second, pro se cases, those in which one or both parties are not represented by counsel, are essentially weighted at one-third of other cases.

The current Courts of Appeals workload measure is based on data from existing statistical reporting systems and is not based on any empirical data about the actual judge time that different types of cases may require. The adjusted case filings measure principally reflects a policy decision regarding the level of appellate court case filings as appropriate for assessing judgeship needs. We found no empirical bases on which to assess the potential accuracy of adjusted filings as a measure of the case-related workload of appellate judges.

In commenting on our report, the Chair of the Judicial Resources Committee noted that the workload of Courts of Appeals Judges entail important factors that have defied measurement, including significant differences in the case processing procedures for Courts of Appeal. We recognize that developing a more discriminating case-related workload measure would not be easy, but we also believe there is a need for a workload measure whose accuracy can be objectively and empirically assessed.

That concludes my statement, Mr. Chairman. I would be pleased to answer any questions you or Members of the Subcommittee may have.

[The prepared statement of Mr. Jenkins follows:]

PREPARED STATEMENT OF WILLIAM O. JENKINS, JR.

GENERAL ACCURACY OF DISTRICT AND APPELLATE JUDGESHIP CASE-RELATED WORKLOAD MEASURES

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the results of our review and assessment of case-related workload measures for district court and courts of appeals judges.[1] Biennially, the Judicial Conference of the United States, the federal judiciary's principal policymaking body, assesses the judiciary's needs for additional judgeships.[2] If the Conference determines that additional judgeships are needed, it transmits a request to Congress identifying the number, type (courts of appeals, district, or bankruptcy), and location of the judgeships it is requesting. In assessing the need for additional district and appellate court judgeships, the Judicial Conference considers a variety of information, including responses to its biennial survey of individual courts, temporary increases or decreases in case filings, and other factors specific to an individual court. However, the Conference's analysis begins with the quantitative case-related workload measures it has adopted for the district courts and courts of appeals-weighted case filings and adjusted case filings, respectively. These two measures recognize, to different degrees, that the time demands on judges are largely a function of both the number and complexity of the cases on their dockets. Some types of cases may demand relatively little time and others may require many hours of work.

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[1] We recently testified on the methodology used to develop the case-related workload measure for bankruptcy judges. See U.S. General Accounting Office, *Federal Bankruptcy Judges: Weighted Case Filings as a Measure of Judges' Case-Related Workload,* GAO–03–789T (Washington, D.C.: May 22, 2003). This testimony is available on GAO's Web site at www.gao.gov.

[2] The Chief Justice of the United States presides over the Conference, which consists of the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year.

My statement is based on our recent report, which you requested, on the relative accuracy of weighted case filings and adjusted case filings as a measure of the case-related workload of district and courts of appeals judges, respectively.[3] Whether weighted case filings and adjusted case filings are reasonably accurate measures of case-related judge workload rests on the soundness of the methodology used to develop these measures. My statement and our report are based on the results of our review of documentation provided by the Federal Judicial Center (FJC) and the Administrative Office of the U.S. Courts (AOUSC) and interviews with officials in each organization. The scope of our work did not include how the Judicial Conference used these case-related workload measures to develop its current judgeship request for district court and courts of appeals judgeships. My statement includes the following major points:

- The district court weighted case filings, as approved in 1993, appear to be a reasonably accurate measure of the average time demands that a specific number and mix of cases filed in a district court could be expected to place on the district judges in that district. The methodology used to develop the case weights was based on a valid sampling procedure, developed weights based on actual case-related time recorded by judges from case filing to disposition, and included a measure (standard errors) of the statistical confidence in the final weight for each weighted case type.
- The case weights, however, are about 10 years old, and the data on which the weights are based are as much as 15 years old. Changes since 1993, such as the characteristics of cases filed in federal district courts and changes in case management practices, may have affected whether the 1993 case weights continue to be a reasonably accurate measure of the average time burden on district court judges resulting from a specific volume and mix of cases.
- The Judicial Conference's Subcommittee on Judicial Statistics has approved a research design for updating the current case weights, and we have some concerns about that design. The design would include limited data on the time judges actually spend on specific types of cases. The proposed design would not include collecting actual data on the noncourtroom time that judges spend on different types of cases. Estimates of the noncourtroom time required for specific types of cases would be based on estimates derived from the structured, guided discussions of about 100 experienced judges meeting in 12 separate groups (one for each geographic circuit). These noncourtroom time estimates are likely to represent the majority of judge time used to develop the new case weights. The accuracy of case weights developed on such consensus data cannot be assessed using standard statistical methods, such as the calculation of standard errors. Thus, it would not be possible to objectively, statistically assess how accurate the new case weights are—weights on whose reasonable accuracy the Judicial Conference will rely in assessing judgeship needs in the future.
- Adjusted case filings, the principal quantitative measure used to assess the case-related workload of courts of appeals judges, are based on available data from standard statistical reports from the courts of appeals. The measure is not based on any empirical data about the judge time required by different types of cases in the courts of appeals. The measure essentially assumes that all cases filed in the courts of appeals, with the exception of pro se cases—those in which one or both parties are not represented by an attorney—require the same amount of judge time. On the basis of the documentation we reviewed, there is no empirical basis on which to assess the accuracy of adjusted filings as a measure of case-related workload for courts of appeals judges.
- Whether the district court case weights are a reasonably accurate measure of district judge case-related workload is dependent upon two variables: (1) the accuracy of the case weights themselves and (2) the accuracy of classifying cases filed in district courts by the case type used for the case weights. If case filings are inaccurately identified by case type, then the weights are inaccurately calculated. Because there are fewer categories used in the courts of appeals workload measure, there is greater margin for error. AOUSC said that its staff took a number of steps to ensure that individual

[3] U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships*, GAO–03–788R (Washington, D.C.: May 30, 2003). This report is available on GAO's Web site at www.gao.gov.

cases were assigned to the appropriate caseweight category. These are described in appendix 1. We did not evaluate how effective these measures may be in ensuring data accuracy.

DISTRICT COURT WEIGHTED CASE FILINGS, AS APPROVED, ARE A REASONABLY ACCURATE MEASURE OF CASE-RELATED JUDGE WORKLOAD

The demands upon judges' time are largely a function of both the number and complexity of the cases on their dockets. Some types of cases may demand relatively little time, and others may require many hours of work. To measure the case-related workload of district court judges, the Judicial Conference has adopted weighted case filings. The purpose of the district court case weights was to create a measure of the average judge time that a specific number and mix of cases filed in a district court would require. Importantly, the weights were designed to be descriptive not prescriptive—that is, the weights were designed to develop a measure of the national average amount of time that judges actually spent on specific types of cases, not to develop a measure of how much time judges should spend on specific types of cases. Moreover, the weights were designed to measure only case-related judge workload. Judges have noncase-related duties and responsibilities, such as administrative tasks, that are not reflected in the case weights.

With few exceptions, such as cases that are remanded to a district court from the courts of appeals, each civil and criminal case filed in a district court is assigned a case weight. Each case filed in a district court is assigned a case weight based on the subject matter of the case. The weight of the overall average case is 1.0. All other weights were established relative to this national average case. Thus, a case with a weight of 0.5 would be expected to require on average about half as much judge time as the national average case, and a case with a value of 2.0 would be expected to require on average about twice as much judge time as the national average case. Case weights for criminal felony defendants are applied on a per defendant basis.[4] For example, the case weight for heroin/cocaine distribution is 2.27. If such a case involved two defendants, the court would be credited with a weight of 4.54—two times the assigned case weight of 2.27. Of course, the actual amount of time a judge may spend on any specific case may be more or less than the national average for that type of case.

Total weighted filings for a district are determined by summing the case weights associated with all the cases filed in the district during the year. Weighted case filings per authorized judgeship—is the total annual weighted filings divided by the total number of authorized judgeships for the district. For example, if a district had total weighted filings of 4,600 and 10 authorized judgeships, its weighted filings per authorized judgeship would be 460. The Judicial Conference uses weighted filings of 430 or more per authorized judgeship as an indication that a district may need one or more additional judgeships. Thus, a district with 460 weighted filings per authorized judgeship could be considered for an additional judgeship.

The Judicial Conference approved the use of the current district court case weights in 1993. The weights are based on a "case-tracking time study," conducted between 1987 and 1993, in which judges recorded the amount of time spent on each of their cases included in the study. The study included about 8,100 civil cases and about 4,200 criminal cases. Overall, the weighted case filings, as approved in 1993, are a reasonably accurate method of measuring the average judge time that a specific number and mix of cases filed in a district court would require. The methodology used to develop the case weights was reasonable. It used a valid sampling procedure, developed weights based on actual case-related time recorded by judges from case filing to disposition, and included a measure (standard errors) of the statistical confidence in the final weight for each weighted case type.

Current Case Weights about 10 Years Old

The case weights are almost 10 years old, and the time data on which they were based are as much as 15 years old. Changes since the case weights were finalized in 1993, such as changes in the characteristics of cases filed in federal district courts and in case management practices, may affect how accurately the weights continue to reflect the time burden on district court judges today. For example, since 1993, new civil causes of action (such as telemarketing issues) and criminal offenses (such as new terrorism offenses) needed to be accommodated within the existing caseweight structure. According to FJC officials, where the new cause of action or criminal offense is similar to an existing case-weight type, the weight for the closest case

[4] The weights do not include nonfelony criminal cases, which are generally the responsibility of magistrate, not district, judges.

type is assigned. Where the new cause of action or criminal offense is clearly different from any existing case-weight category, the weight assigned is that for either "all other" civil cases or "all other" criminal cases.

Concerns about the Research Design for Updating the District Court Case Weights

The Subcommittee on Judicial Statistics of the Judicial Conference's Committee on Judicial Resources has approved the research design for revising the current case weights, with the goal of having new weights submitted to the Resources Committee for review in the summer of

2004. The design for the new case weights relies on three sources of data for specific types of cases: (1) data from automated databases identifying the docketed events associated with cases; (2) data from automated sources on the time associated with courtroom events for cases, such as trials or hearings; and (3) estimated time data from structured, guided discussion among experienced judges on the time associated with noncourtroom events for cases, such as reading briefs or writing opinions.

Although the proposed methodology appears to offer the benefit of reduced judicial burden (no time study data collection), potential cost savings, and reduced calendar time to develop the new weights, we have two principal concerns about the research design—the challenge of obtaining reliable, comparable data from two different automated data systems for the analysis and the limited collection of actual data on the time judges spend on cases.

The design assumes that judicial time spent on a given case can be accurately estimated by viewing the case as a set of individual tasks or events in the case. Information about event frequencies and, where available, time spent on the events would be extracted from existing administrative data bases and reports and then used to develop estimates of the judge—time spent on different types of cases. For event data, the research design proposes using data from new technology (the Case Management/Electronic Case Filing System) that is currently being introduced into the court system for recording case management information. However, not all courts have implemented the new system, and data from the existing and new systems will have to be integrated to obtain and analyze the event data. FJC researchers, who would conduct the research, recognize the challenges this poses and have developed a strategy for addressing the issues, which includes forming a technical advisory group from FJC, the Administrative Office of the U.S. Courts, and individual courts to develop a method of reliably extracting and integrating data from the two case management systems for analysis.

Second, the research design does not require judges to record time spent on individual cases. Actual time data would be limited to that available from existing reports on the time associated with courtroom events and proceedings for different types of cases. However, a majority of district judges' time is spent on case-related work outside the courtroom. The time required for noncourtroom events would be derived from structured, guided discussions of groups of 8 to 13 experienced district court judges in each of the 12 geographic circuits (about 100 judges in all). The judges would develop estimates of the time required for different events in different types of cases within each circuit, using FJC-developed "default values" as the reference point for developing their estimates. These default values would be based in part on the existing case weights and in part on other types of analyses. Following the meetings of the judges in each circuit, a national group of 24 judges (2 from each circuit) would consider the data from the 12 circuit groups and develop the new weights.

The accuracy of judges' time estimates is dependent upon the experience and knowledge of the participating judges and the accuracy and reliability of the judges' recall about the time required for different events in different types of cases—about 150 if all the case types in the current case weights were used. These consensus data cannot be used to calculate statistical measures of the accuracy of the resulting case weights. Thus, it will not be possible to objectively, statistically assess how accurate the new case weights are—weights on whose accuracy the Judicial Conference will rely in assessing judgeship needs in the future.

A time study conducted concurrently with the proposed research methodology would be advisable to identify potential shortcomings of the event-based methodology and to assess the relative accuracy of the case weights produced using that methodology. In the absence of a concurrent time study, there would be no objective statistical way to determine the accuracy of the case weights produced by the proposed event-based methodology.

ADJUSTED CASE FILINGS: ACCURACY OF COURTS OF APPEALS CASE-RELATED WORKLOAD MEASURE CANNOT BE ASSESSED

The principal workload measure that the Judicial Conference uses to assess the need for additional courts of appeals judges is adjusted case filings. We found that adjusted case filings are based on data available from standard statistical reports for the courts of appeals. The measure is not based on any empirical data about the judge time required by different types of cases in the courts of appeals.

The Judicial Conference's policy is that courts of appeals with adjusted case filings of 500 or more per three-judge panel may be considered for one or more additional judgeships. Courts of appeals generally decide cases using constantly rotating three-judge panels. Thus, if a court had

12 authorized judgeships, those judges could be assigned to four panels of three judges each. In assessing judgeship needs for the courts of appeals, the Conference may also consider factors other than adjusted case filings, such as the geography of the circuit or the median time from case filings to dispositions.

Adjusted case filings are used for 11 of the 12 courts of appeals. It is not used for the Court of Appeals for the D.C. Circuit. A FJC study of that court's workload determined that adjusted case filings were not an appropriate means of measuring the court's judgeship needs. The court had a high proportion of administrative agency appeals that occurred almost exclusively in the Court of Appeals for D.C. and were more burdensome than other types of cases in several respects—e.g., more independently represented participants per case, more briefs filed per case, and a higher rate of case consolidation.[5]

Essentially, the adjusted case filings workload measure counts all case filings equally, with two exceptions. First, cases refiled and approved for reinstatement are excluded from total case filings.[6] Second, two-thirds of pro se cases—defined by the Administrative Office as cases in which one or both of the parties are not represented by an attorney—are deducted from total case filings (that is, they are effectively weighted at 0.33). For example, a court with 600 total pro se filings in a fiscal year would be credited with 198 adjusted pro se case filings (600 × 0.33). The remaining nonpro se cases would be weighted at 1.0 each. Thus, a court of appeals with 1,600 case filings (excluding reinstatements)—600 pro se cases and 1,000 nonpro se cases—would be credited with 1,198 adjusted case filings (198 discounted pro se cases plus 1,000 nonpro se cases). If this court had 6 judges (allow two panels of 3 judges each), it would have 599 adjusted case filings per 3-judge panel, and, thus, under Judicial Conference policy, could be considered for an additional judgeship.

The current court of appeals workload measure represents an effort to improve the previous measure. In our 1993 report on judgeship needs assessment, we noted that the restraint of individual courts of appeals, not the workload standard, seemed to have determined the actual number of appellate judgeships the Judicial Conference requested.[7] At the time the current measure was developed and approved, using the new benchmark of 500 adjusted case filings resulted in judgeship numbers that closely approximated the judgeship needs of the majority of the courts of appeals, as the judges of each court perceived them. The current courts of appeals case-related workload measure principally reflects a policy decision using historical data on filings and terminations. It is not based on empirical data regarding the judge time that different types of cases may require. On the basis of the documentation we reviewed, we determined that there is no empirical basis for assessing the potential accuracy of adjusted filings a measure of case-related judge workload.

RECOMMENDATIONS

In our report, we recommended that the Judicial Conference of the United States

- update the district court case weights using a methodology that supports an objective, statistically reliable means of calculating the accuracy of the resulting weights; and
- develop a methodology for measuring the case-related workload of courts of appeals judges that supports an objective, statistically reliable means of cal-

[5] The Conference did not request any judgeships in 2003 for the D.C. Court of Appeals.

[6] Such cases were dismissed for procedural defaults when originally filed, but "reinstated" to the court's calendar when the case was later refiled. The number of such cases, as a proportion of total cases, is generally small.

[7] U.S. General Accounting Office, *Federal Judiciary: How the Judicial Conference Assesses the Need for More Judges*, GAO/GGDN93N31 (Washington, D.C.: Jan. 29, 1993).

culating the accuracy of the resulting workload measure(s) and that addresses the special case characteristics of the Court of Appeals for the D.C. Circuit.

In a May 27, 2003, letter to GAO, the Chair of the Committee on Judicial Resources said that the development of the new case weights will use substantial data already collected and that our report did not reflect the sophisticated methodology the FJC had designed for the study nor acknowledge the substantial increased costs and time involved in a time study that was likely to offer little or no added value for the investment. The letter also noted that the workloads of the courts of appeals entail important factors that have defied measurement, including the significant differences in the courts' case processing techniques. The Deputy Director of FJC, in a May 27, 2003, letter agreed that the estimated data on noncourtroom judge time in the new study would not permit the calculation of standard errors. However, the integrity of the resulting case-weight system could still be evaluated on the basis of adherence to the procedures that will be used to gather the data and promote their reliability.

We believe that our analysis and recommendations are sound and that the importance and costs of creating new Article III federal judgeships requires the best possible case-related workload data to support the assessment of the need for more judgeships.

That concludes my statement, Mr. Chairman, and I would be pleased to answer any questions you or other Members of the Subcommittee may have.

APPENDIX 1

QUALITY ASSURANCE STEPS THE JUDICIARY TAKES TO ENSURE THE ACCURACY OF CASE FILING DATA FOR WEIGHTED FILINGS

Whether the district court case weights are a reasonably accurate measure of district judge case-related workload is dependent upon two variables: (1) the accuracy of the case weights themselves and (2) the accuracy of classifying cases filed in district courts by the case type used for the case weights. If case filings are inaccurately identified by case type, then the weights are inaccurately calculated. Because there are fewer categories used in the courts of appeals workload measure, there is greater margin for error. The database for the courts of appeals should accurately identify (1) pro se cases, (2) reinstated cases, and (3) all cases not in the first two categories.

All current records related to civil and criminal filings that are reported to the Administrative Office of the U.S. Courts (AOUSC) and used for the district court case weights are generated by the automated case management systems in the district courts. Filings records are generated monthly and transmitted to AOUSC for inclusion in its national database. On a quarterly basis, AOUSC summarizes and compiles the records into published tables, and for given periods these tables serve as the basis for the weighted caseload determinations.

In responses to written questions, AOUSC described numerous steps taken to ensure the accuracy and completeness of the filings data, including the following:

- Built-in, automated quality control edits are done when data are entered electronically at the court level. The edits are intended to ensure that obvious errors are not entered into a local court's database. Examples of the types of errors screened for are the district office in which the case was filed, the U.S. Code title and section of the filing, and the judge code. Most district courts have staff responsible for data quality control.
- A second set of automated quality control edits are used by AOUSC when transferring data from the court level to its national database. These edits screen for missing or invalid codes that are not screened for at the court level, such as dates of case events, the type of proceeding, and the type of case. Records that fail one or more checks are not added to the national database and are returned electronically to the originating court for correction and resubmission.
- Monthly listings of all records added to the national database are sent electronically to the involved courts for verification.
- Courts' monthly and quarterly case filings are monitored regularly to identify and verify significant increases or decreases from the normal monthly or annual totals.
- Tables on case filings are published on the Judiciary's intranet for review by the courts.

- Detailed and extensive statistical reporting guidance is provided to courts for reporting civil and criminal statistics. This guidance includes information on general reporting requirements, data entry procedures, and data processing and reporting programs.
- Periodic training sessions are conducted for district court staff on measures and techniques associated with data quality control procedures.

AOUSC did not identify any audits to test the accuracy of district court case filings or any other efforts to verify the accuracy of its electronic data by comparing the electronic data to "hard copy" case records for district courts. Within the limited time for our review, AOUSC was unable to obtain information from individual courts to include in its responses. We have no information on how effective the procedures AOUSC described may be in ensuring that the data in the automated databases were accurate and reliable means of assigning weights to district court case filings.

ATTACHMENT

G A O
Accountability • Integrity • Reliability
United States General Accounting Office
Washington, DC 20548

May 30, 2003

The Honorable Lamar Smith
Chairman
Subcommittee on Courts, the Internet,
and Intellectual Property
Committee on the Judiciary
House of Representatives

Subject: *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships*

Dear Mr. Chairman:

Biennially, the Judicial Conference, the federal judiciary's principal policymaking body, assesses the judiciary's needs for additional judgeships.[1] If the Conference determines that additional judgeships are needed, it transmits a request to Congress identifying the number, type (courts of appeals, district, or bankruptcy), and location of the judgeships it is requesting. In 2003, the Judicial Conference sent to Congress requests for 93 new judgeships--11 for the courts of appeals, 46 for the district courts, and 36 for the bankruptcy courts.[2]

In assessing the need for additional judgeships, the Judicial Conference considers a variety of information, including responses to its biennial survey of individual courts, temporary increases or decreases in case filings, and other factors specific to an individual court. However, the Judicial Conference's analysis begins with the quantitative case-related workload measures it has adopted for the district courts and courts of appeals—weighted case filings and adjusted case filings, respectively. These two measures recognize, to different degrees, that the time demands on judges are largely a function of both the number and complexity of the cases on their dockets. Some types of cases may demand relatively little time and others may

[1]The Chief Justice of the United States presides over the Conference, which consists of the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year.

[2]This report covers the methodology used to develop the case-related workload measures for district court and courts of appeals judges. We recently testified on the methodology used to develop the case-related workload measure for bankruptcy judges. (See *Federal Bankruptcy Judges: Weighted Case Filings as a Measure of Judges' Case-Related Workload*, GAO-03-789T (Washington, D.C.: May 22, 2003)).

require many hours of work. Generally, each case filed in a district court is assigned a weight representing the average amount of judge time the case is expected to require. A case with a weight of 3.0, for example, would be expected to take twice as much time as a case with a weight of 1.5. In the courts of appeals, pro se case filings—those in which one or both parties are not represented by an attorney—are weighted at 0.33 and all other case filings at 1.0.

Using these measures, individual courts whose past case-related workload meets the threshold established by the Judicial Conference may be considered for additional judgeships. These thresholds are 430 weighted case filings per authorized judgeship for district courts and 500 adjusted case filings per three-judge panel of authorized judgeships for the courts of appeals (courts of appeals judges generally hear cases in rotating panels of three judges each). Authorized judgeships are the total number of judgeships authorized by statute for each district court and court of appeals.

The Judicial Conference relies on these quantitative workload measures to be reasonably accurate measures of judges' case-related workload. Whether these measures are reasonably accurate rests in turn on the soundness of the methodology used to develop them. As agreed with your office, our objectives were to (1) determine whether the methods the Judicial Conference uses to quantitatively measure the case-related workload of district court and court of appeals judges results in a reasonably accurate measure of judges' case-related workload, (2) assess the reasonableness of any proposed methodologies to update the workload measures, and (3) obtain information from the Administrative Office of the U.S. Courts (AOUSC) on the steps the Judiciary takes to ensure that the case filing data required for these workload measures are accurate. The information for the last objective is presented in enclosure I. The scope of our work specifically excluded any analysis of how the Judicial Conference used the case-related workload measures to develop its current judgeship request.

Results in Brief

The district court weighted case filings, as approved in 1993, appear to be reasonably accurate and are based on a reasonable methodology. However, they are about 10 years old, and we have concerns about the research design approved to update them.

Overall, the weighted case filings, as approved in 1993, appear to be a reasonably accurate measure of the average time demands that a specific number and mix of cases filed in a district court could be expected to place on the district judges in that court. The methodology used to develop the weights used a valid sampling procedure, developed weights based on actual case-related time recorded by judges from case filing to disposition, and included a measure (standard errors) of the statistical confidence in the final weight for each weighted case type. Without such a measure, it is not possible to assess the accuracy of the final case weights. However, the case weights are about 10 years old, and the data on which the weights were based are as much as 15 years old. Changes since 1993, such as the characteristics of cases filed in federal district courts and changes in case management practices, may have affected whether the 1993 weights continue to be a reasonably accurate measure of the average time burden on district court judges resulting from a specific volume and mix of cases. Some of these changes may have increased time demands;

others may have reduced time demands. To the extent that the current case weights understate or overstate the total case-related time demands on district judges, the weights could potentially result in the Judicial Conference understating or overstating the need for new district court judgeships.

The Judicial Conference's Subcommittee on Judicial Statistics has approved a research design for updating the current case weights, and we have some concerns about that design. The design would include limited data on the time judges actually spend on specific types of cases. Much of the time data used would be based on consensus estimates from groups of experienced judges. Such data cannot be used to develop an objective, statistical measure of the accuracy of the final case weights. Without such a measure, it is not possible to determine whether the case weights are in fact a reasonably accurate measure of case-related judge workload. In assessing the need for judgeships in specific courts, the Judicial Conference relies on the case weights to be a reasonably accurate measure of judges' case-related workload.

Unlike the district court case weights, the adjusted filings workload measure for appellate judges is not based on any empirical data regarding the time that different types of cases required of courts of appeals judges. The adjusted filings workload measure basically assumes that all cases have an equal effect on judges' workload with the exception of *pro se* cases—those in which one or both parties are not represented by a lawyer—which are weighted at 0.33, or one-third as much as all other cases. In the documentation we reviewed, we found no empirical data to support that assumption. The current court of appeals case-related workload measure, adopted in 1996, reflects an effort to improve the previous measure, which may have tended to overstate judgeship needs. At the time the current measure was developed and approved, using the new benchmark of 500 adjusted case filings resulted in judgeship numbers that closely approximated the judgeship needs of the majority of the courts of appeals, as the judges of each court of appeals perceived them. However, on the basis of the documentation we reviewed, there is no empirical basis on which to assess the accuracy of adjusted filings as a measure of case-related workload for courts of appeals judges.

Weighted Case Filings: District Judge Case-Related Workload Measure Is Reasonably Accurate, but 10 Years Old, and the Plan to Update It Raises Some Concerns

The purpose of the district court case weights was to create a measure of the average judge time that a specific number and mix of cases filed in a district court would require. Importantly, the weights were designed to be descriptive not prescriptive—that is, the weights were designed to develop a measure of the national average amount of time that judges actually spent on specific types of cases, not to develop a measure of how much time judges should spend on various types of cases. Finally, the weights were designed to measure only case-related judge workload. Judges have noncase-related duties and responsibilities, such as administrative tasks, that are not reflected in the case weights.

Case Weights Measure Average Judicial Time Demands

With a few exceptions, such as cases that are remanded to a district court from the courts of appeals, each civil and criminal case filed in a district court is assigned a case weight that varies from 0.031 (for cases involving defaulted student loans or veterans benefit overpayments) to 5.99 (for death penalty habeas corpus cases) based on the subject matter of the case.[3] The weight of the overall average case is 1.0. All other case weights were established relative to this national average case.[4] Thus, a case with a weight of 0.5 would be expected to require on average about half as much judicial time as the national average case. Conversely, a case with a weight of 2.0 would be expected to take twice as much time as the national average case. Case weights for criminal felony cases are applied on a per defendant basis.[5] For example, the case weight for heroin/cocaine distribution is 2.27. A heroin/cocaine distribution case with two defendants would be weighted at 4.54—two times the assigned weight of 2.27. The actual amount of time a judge may spend on individual cases of any specific type may be more or less than the national average for that type of case.

The total annual weighted filings for a district are determined by summing the case weights associated with all the cases filed in the district during the year. Weighted case filings per authorized judgeship is the total annual weighted filings divided by the total number of authorized judgeships. For example, if a district had total weighted filings of 4,600 and 10 authorized judgeships, its weighted filings per authorized judgeship would be 460. The Judicial Conference uses weighted filings of 430 or more per authorized judgeship as an indication that a district may need additional judgeships. Thus, a district with 460 weighted filings per authorized judgeship could be considered for an additional judgeship.

In assessing judgeship needs, the weighted case filings are calculated using authorized judgeships (a number which includes any vacancies). This is a measure of the average workload per judge in a district court if all the court's authorized judgeships were filled. Calculating the weighted case filings per active judge—that is, on the basis of the number of authorized judgeships filled—would show the burden of existing vacancies on active judges, but not necessarily the need for more judgeship positions.

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[3]Weights are assigned to each civil case counted as an original filing, removal from state courts, or interdistrict transfer (transfers from one district to another). Weights are also assigned to each felony defendant counted as an original filing, reopened filing, or interdistrict transfer. Generally, felonies are those crimes that carry a term of imprisonment of more than 1 year. Weights are not assigned to civil cases remanded to the district courts from the courts of appeals, reopened cases, or multidistrict litigation transfers—cases transferred to a single district from a number of districts for disposition, such as asbestos or breast implant litigation.

[4]Some types of civil cases were weighted differently if they involved the United States as a party or were removed from state court to federal court.

[5]The weights do not include nonfelony criminal cases, which are generally the responsibility of magistrate, not district, judges.

Case Weights Calculated in 1993 Using Time Data Recorded by Judges

The Judicial Conference approved the use of the current district court case weights in 1993. The weights are based on a "case-tracking time study," conducted between 1987 and 1993, in which judges recorded the amount of time they spent on each of their cases included in the time study.[6] The study included about 8,100 civil cases and about 4,200 criminal cases that were generally "tracked" from filing to disposition.[7] All judges who worked on each case were supposed to record the time they worked on the case.[8]

Data collection for the time study began in November 1987. Districts were brought into the study over a 2-year period, with the last district entering the study in January 1990. When a district was brought into the study, a 2-week period was designated for sampling, during which all cases filed were included in the time study sample.

At the conclusion of the study, sample cases were grouped into civil and criminal cases, with individual subclassifications (case types) for each, such as "Contract: Insurance" and "Bank Robbery." Each sample case had a value associated with it, which was the total number of minutes reported by the district judge(s) who worked on it. The number of sample cases in the subclassifications ranged from 18 to 1,563. Within each subclassification, a simple average and a standard error were computed. The averages and standard errors were converted into relative values as the final step in creating the case weights—that is, all the weights were calculated relative to the time required for the average case in the study.

Methodology Used to Develop Case Weights Was Reasonable

Overall, the weighted case filings, as approved in 1993, are a reasonably accurate method of measuring the average judge time that a specific number and mix of cases filed in a district court could require. The methodology used to develop the weights is reasonable. It used a valid sampling procedure, developed weights based on actual case-related time recorded by judges from case filing to disposition, and included a measure (standard errors) of the statistical confidence in the final weight for each weighted case type.

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[6]The time study for bankruptcy courts was a "diary study" in which judges recorded the time spent on case-related and noncase-related work during a 10-week period. Although each method has different strengths and limitations, each method can produce useful, reasonably accurate results. Enclosure II includes a comparison of these two methodologies.

[7]Not all cases were completed by the end of the study; some were still pending.

[8]This included district judges, senior judges, magistrate judges, and visiting judges. District judges—nonsenior and senior—exercise the full judicial authority vested in the district courts. Nonsenior district judges are those who hold a designated judgeship position and generally carry a full caseload. Senior district judges are judges who have retired from regular, full-time active service but remain on the bench and perform such judicial duties as they are willing and able. Magistrate judges, appointed for a fixed term of years, exercise the judicial duties permissible by statute and the Constitution that the district courts delegate to them. Visiting judges are those visiting from their "home court" to assist in addressing the workload of the court they are visiting. Visiting judges may or may not be senior judges. Time reported by magistrate judges was not included in the final computations of the case weights.

The sampling method was appropriately designed to ensure that all district judges and all case types could potentially be included in the sample. The staggered entries of districts into the study ensured the selection of case samples were taken throughout the year, reducing or eliminating bias due to seasonal variation in case filings. Every district court judge could potentially have been a participant in the study (depending on when the 2-week window was designated at a given district and case assignments during that period).

The method of recording the time spent on each case was designed to capture all judge time spent on a sample case. Although it was not possible to determine if all reportable judge time was in fact recorded and reported, validity checks on the reported time were made where possible. For example, judge-reported courtroom time in each sample case was compared with the time reported for the same case in the judiciary's database on courtroom proceedings.

The empirical data on hours expended on each case in the sample were used to develop the case weights. The case weights for specific types of cases were basically determined by dividing the total amount of time judges reported for that type of case by the number of such cases in the study. For example, if judges reported a total of 2,000 hours for 200 cases of a specific type in the study, this would translate into 10 hours per case. Sampling variability in the estimates based on the time study data was quantified and provided with the weights. The standard error that is associated with each weight provides an indicator of variability due to the weight being produced via a sample, rather than data from the universe of cases during the study period. The standard errors can be used to display the statistical reliability of the weighted case filings estimate for each district. Without some measure of statistical reliability, it is not possible to objectively assess how accurate the case weights are.

The case weights are relative weights. That is, each case weight was calculated relative to the average case as determined in the study, which was assigned a value of 1.0. For example, a case type with a weight of 2.0 would be expected to require twice as much judge time as the "average" case. Relative weights were determined by dividing the absolute weight of each type of case by the weight or value of the average case. The Federal Judicial Center (FJC) converted absolute weights to relative weights by dividing the absolute weight values by 2.132. This value was chosen after FJC conducted research to determine how to produce a new set of relative weights that they considered to be comparable to the previous set of relative weights. As described by FJC officials, this approach was reasonable.

For the purposes of applying the national weights to individual districts, the methodology assumed two things: (1) that the district's judges were typical of district judges as a whole and (2) that the district's cases of any given type were typical of that case type as a whole. This may or may not have been true, but these are reasonable assumptions given the purpose of the study—to develop weights based on national averages, not to develop weights for individual districts or judges.

Research Design for Updating the District Court Case Weights Raises Concerns

The case weights are almost 10 years old, and the time data on which they were based are as much as 15 years old. Changes since the case weights were finalized in

1993, such as changes in the characteristics of cases filed in federal district courts and in case management practices, may affect how accurately the weights continue to reflect the time burden on district court judges today. For example, since 1993, new civil causes of action (such as telemarketing issues) and criminal offenses (new terrorism offenses) needed to be accommodated within the existing case-weight structure. According to FJC officials, where the new cause of action or criminal offense is similar to an existing case-weight type, the weight for the closest case type is assigned. Where the new cause of action or criminal offense is clearly different from any existing case weight category, the weight assigned is that for either "all other civil" for civil cases or "all other criminal" for criminal cases.

The Subcommittee on Judicial Statistics of the Judicial Conference's Judicial Resources Committee has approved the research design for revising the current case weights, with a goal of having new weights submitted to the Resources Committee for review in the summer of 2004. The research would be led by FJC, who developed the research design. Although the methodology for updating the case weights appears to offer the benefit of reduced judicial burden (no time study data collection), potential cost savings, and reduced calendar time to develop the new weights, we have some concerns about the basic research design.

Our principal concerns are two: the challenge of obtaining reliable, comparable data from two different automated data systems for the analysis and the limited collection of actual data on the time judges spent on cases. Essentially, the design for the new case weights relies on three sources of data for specific types of cases: (1) data from automated databases identifying the docketed events associated with cases; (2) data from automated sources on the time associated with courtroom events for cases; and (3) consensus estimates from structured, FJC-guided discussions among experienced judges on the judge-time required for noncourtroom events in the cases, such as reading briefs or writing opinions. The design assumes that judicial time spent on a given case can be accurately estimated by viewing the case as a set of individual tasks or events in the case. Information about event frequencies and, where available, time spent on the events would be extracted from administrative databases and reports, and then used to develop estimates of the judge-time spent on different types of cases. For event data, the research design proposes using new technology (the Case Management/Electronic Case Filing system) that is currently being introduced into the court system for recording case management information. However, not all courts have implemented the new system, and data from the existing and new systems will have to be integrated in the study. Successfully integrating the data from these two databases will be a challenge. FJC recognizes this and has developed a strategy for addressing the issues, which includes forming a technical advisory group from FJC, AOUSC, and individual courts to develop a method of reliably extracting and integrating data from the two case management systems for analysis.

Second, the design for developing the new weights does not require judges to record time spent on individual cases. A significant limitation of the time data to be used is that the time data available from existing databases and reports are limited to time associated with courtroom events and proceedings, while a majority of district judges' time is spent on case-related work outside the courtoom. The time required for noncourtroom events, such as reviewing briefs, will be based on the consensus of groups of experienced judges. Groups of 8 to 13 district judges in each of the 12

circuits (about 100 in all) will meet in a series of structured discussions to develop estimates of the time required for different events in different types of cases within each circuit, using FJC-developed "default values" as the reference point for developing their estimates. These default values would be based in part on the existing case weights and in part on other types of analyses. Following this series of meetings, a national group of 24 judges (2 from each circuit), using structured procedures, will consider the data from the 12 circuit groups and develop consensus time estimates for use in developing the weights. These consensus time estimates are likely to represent a majority of the judge time used to develop the new weights. These consensus data are dependent upon the experience and knowledge of the participating judges and the accuracy and reliability of the judges' recall about the average time required for different events in different types of cases—about 150 if all case types in the current case weights were used. The greater the number of events and types of cases for which judges are asked to make estimates, the greater the demands on judges to recall accurately the judge time associated with specific events and types of cases. These consensus data cannot be used to calculate statistical measures of the accuracy of the resulting case weights. Thus, it will not be possible to objectively, statistically assess how accurate the new case weights are—weights on whose reasonable accuracy the Judicial Conference will rely in assessing judgeship needs in the future.

A concurrent time study using "case tracking" or "diary" methods would be advisable to identify potential shortcomings of the event-based procedure and to assess the relative accuracy of the case weights that are produced using that procedure. In the absence of a concurrent time study, there would be no objective, statistical way to determine the accuracy of the case weights produced by the proposed event-based methodology.

Adjusted Case Filings: Courts of Appeals Judge Workload Measure Lacks Empirical Basis for Assessing Its Potential Accuracy

The principal quantitative workload measure that the Judicial Conference uses to assess the need for additional courts of appeals judges is adjusted case filings. We found the adjusted filings workload measure is based on available data from standard statistical reports for the courts of appeals. The measure is not based on any empirical data about the judge time required by different types of cases in the courts of appeals.

The Judicial Conference's policy is that courts of appeals with adjusted case filings of 500 or more per three-judge panel may be considered for additional judgeships. Courts of appeals generally decide cases using constantly rotating three-judge panels. Thus, if a court had 12 authorized judgeships, those judges could be assigned to four panels of three judgeships each. The Conference may also consider factors other than adjusted case filings, such as the geography of the circuit or the median time from case filings to disposition. For 11 of the 12 courts of appeals, the Judicial Conference counts all case filings equally, with two exceptions. (There is no specific workload measure established for the D.C. circuit, as discussed later.) First, cases

refiled and approved for reinstatement are excluded from total case filings.[9] Second, two-thirds of pro se cases—defined by AOUSC as cases in which one or both of the parties are not represented by legal counsel—are deducted from total case filings (that is, they are effectively weighted at 0.33). For example, a court with 600 total pro se case filings in fiscal year 2001 would be credited with 198 adjusted pro se case filings (600 x 0.33). The remaining nonpro se cases would be weighted at 1.0 each. Thus, a court of appeals with 1,600 case filings (excluding reinstatements)—600 pro se cases and 1,000 nonpro se cases—would be credited with 1,198 "adjusted" case filings (198 discounted pro se cases plus 1,000 nonpro se cases). If this court had 6 judges (allowing two panels of 3 judges each), it would have 599 adjusted case filings per 3-judge panel, and thus, under the Judicial Conference's policy, could be considered for additional judgeships.

The current case-related workload measure for courts of appeals judges, adopted in 1996, is similar in concept to the measure we reviewed in 1993.[10] Table 1 illustrates the similarities and differences in the two measures. Although the current workload measure is expressed in terms of appellate case filings, both the 1986 and 1996 case-related workload measures are based on assumptions about the judge workload associated with merit dispositions. Merit dispositions are cases that are decided on the legal rights of the parties to the case rather than on technical issues, such as lack of federal jurisdiction.

The workload measure we reviewed in 1993 was based on 5-year averages of merit dispositions in each circuit separately, and the result was not necessarily comparable among circuits because of the different methods that each circuit used to decide its cases. The current measure uses a single national standard for all circuits. Using national data on merit dispositions as a percentage of case filings in 1994, the current workload measure was based on the assumption that nationally about 55 percent of all appellate case filings—except for pro se filings and reinstated filings—result in merit dispositions. Thus, 500 adjusted case filings would represent 275 merit dispositions—or 20 more than the 255 used in the 1986 measure. The increase from 255 to 275 was basically a matter of establishing equity between the district courts and courts of appeals workload thresholds. To be considered for additional district court judgeships, the Judicial Conference had raised the threshold from 400 to 430 weighted case filings per judgeship (a 7.5-percent increase). The new merit dispositions standard raised the threshold for courts of appeals from 255 to 275 merit dispositions (a 7.8-percent increase).

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[9]Such cases were dismissed for procedural defaults when originally filed but "reinstated" to the court's calendar when the case was later refiled. The number of such cases, as a proportion of total cases, is generally small.

[10]U.S. General Accounting Office, *Federal Judiciary: How the Judicial Conference Assesses the Need for More Judges*, GAO/GGD-93-31 (Washington, D.C.: Jan. 29, 1993).

Table 1: A Comparison of the 1986 and 1996 Methods of Measuring Case-Related Workload for Courts of Appeals Judges

1986	1996
The benchmark for considering additional judgeships in a court of appeals is 255 merit dispositions per 3-judge panel.	The benchmark for considering additional judgeships in a court of appeals is 500 adjusted case filings per 3-judge panel.
Prisoner petition cases (a subset of pro se cases) are counted as one-half of an appellate case filing.	Pro se cases (which include prisoner petitions) are counted as one-third of an appellate case filing.
Uses a 5-year average merit termination rate for each individual circuit.	Uses single standard of 500 adjusted filings for all courts of appeals.
No other adjustments.	Does not count number of appeals reinstated after procedural default as part of adjusted filings to prevent double counting of appeals.
Calculations are based on actual 5-year average merit terminations rate for each court of appeals.	Calculations apply to each circuit's appellate case filings.

Source: FJC documentation and interviews.

The current court of appeals case-related workload measure represents an effort to improve the previous measure. As we noted in our 1993 report, using the previous measure the courts of appeals' own restraint, not the workload standard, seemed to have determined the actual number of appellate judgeships the Judicial Conference requested. At the time the current measure was developed and approved, using the new benchmark of 500 adjusted case filings resulted in judgeship numbers that closely approximated the judgeship needs of the majority of the courts of appeals, as the judges of each court perceived them. The current court of appeals case-related workload measure principally reflects a policy decision using historical data on filings and terminations. In 1995, the Subcommittee on Judicial Statistics of the Judicial Conference's Judicial Resources Committee sent a survey to the chief judge of each circuit court of appeals. In the responses, there was no agreement that either the 500 adjusted filings standard or a weight of 0.33 for pro se cases were the appropriate standards. Unlike the district court case weights, the adjusted filings workload measure is not based on empirical data regarding the judge time that different types of case may require. On the basis of the documentation we reviewed, we determined there is no empirical basis for assessing the potential accuracy of adjusted filings as a measure of case-related judge workload.

The D.C. Circuit—Adjusted Case Filings Not Applicable to Its Unusual Caseload

In a report to a Judicial Conference subcommittee,[11] FJC discussed some of the distinctive features of the Court of Appeals for the D.C. Circuit. The report noted that approximately 30 percent of the circuit's filings in fiscal years 1996-1997 were administrative agency appeals that occur almost exclusively in the D.C. circuit and were more burdensome than other cases in several aspects. On average, these cases

- had more independently represented participants per case;
- were more likely to have participants with multiple objectives, involve complex or statutory law, and require the mastery of technical or scientific information;
- had more briefs filed per case;
- had a higher proportion of cases that were terminated; and

[11]Federal Judicial Center, *Assessment of Caseload Burden in the U.S. Court of Appeals for the D.C. Circuit*, Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States (Washington, D.C.: 1999).

- had a higher rate of case consolidation (where two or more cases are combined for decision).

The report concluded that the need for additional judgeships in the D.C. circuit should not be measured using the general workload threshold of 500 adjusted case filings per 3-judge panel. However, because no information was available on judges' actual time expenditures, there was no empirical basis for suggesting a specific alternative formula for assessing the D.C. circuit's judgeship needs. The report also concluded that the D.C. circuit's remaining caseload—that is, all cases other than administrative agency appeals—was generally not distinguishable from the caseloads of the other circuits. The report suggested several possible ways to integrate the D.C. circuit into the existing adjusted weighted filings system, such as giving greater weight to federal agency appeals or lowering the general threshold of 500 adjusted filings per 3-judge panel for the D.C. circuit. The Judicial Conference has not yet adopted any specific workload measure for the D.C. circuit. However, the Judicial Conference requested no additional judgeships for the D.C. circuit in 2003.

No Judicial Conference Consensus on How to Revise Adjusted Filings Workload Measure

In 1993, we recommended that the Judicial Conference improve its workload measure for the courts of appeals.[12] In the last decade, the Judicial Conference has considered a number of proposals for developing a revised case-related workload measure for courts of appeals judges, but the Conference has been unable to reach a consensus on any approach. As part of its assistance to the Conference in this effort, FJC in 2001 compiled a document that reviewed previous proposals to develop some type of case weighting measure for the courts of appeals.[13] Table 2 outlines some of these proposals and their advantages and disadvantages, as identified by FJC.

[12]U.S. General Accounting Office, *Federal Judiciary: How the Judicial Conference Assesses the Need for More Judges*, GAO/GGD-93-31 (Washington, D.C.: Jan. 29, 1993).

[13] Federal Judicial Center, *Review of Previous Appellate Case Weighting Proposals*, (Washington, D.C.: Aug. 22, 2001).

Table 2: Past Proposals to Revise the Case-Related Workload Measure for Courts of Appeals Judges

Proposal	Advantages	Disadvantages
1. Estimation of case burden based on actual time required to process the case.	• The quantitative approach would be very thorough. • Empirically based data.	• Judges may not be amenable to the time-consuming task of recording the hours spent on individual cases. • Time spent gathering data could be used elsewhere.
2. Estimate of case burden based on the assessment of burden of only "certain characteristics" from an already-existing database of "factors."	• Would not be very time-consuming for judges. • Would assess the frequencies of certain "factors." • Analysis of an existing database would save time. • Can use a "wealth" of factors to get a big picture of the caseload burden.	• Difficult to agree on which factors to use. • Difficult to decide if presence and absence of factors is enough information. • Database and survey accuracy may be compromised.
3. Normative assessment of cases to look qualitatively at the cases as a whole.	• Convenient to extract information from surveys or group discussions.	• Difficult to decide which factors to use. • Dependent upon accuracy of judges recall about the case. • Lack of empirically based data.
4. Using multiple regression to use information about the proportional mix of cases with different defined characteristics in the different circuits to account for the differences in case termination level.	• Quantitative approach to determine factors to use.	• Use of a potentially incomplete model. • Inherent statistical limits. • Cannot assess appellate burdens on a national level.
5. Using district court weights for the appellate system.	• Already available data. • Save time by using existing data.	• Little consistency between the two court systems. • Sacrifice accuracy.
6. Tallying court opinions (published and unpublished).	• Most appellate judge work leads to production of appellate opinions in chambers.	• Necessary information cannot be obtained consistently.
7. Sampling cases for approximately 3 months for a case-based study (Nov. 8, 1993).	• Can project the results of 3 months of cases, to the rest of the year.	• There is no way to anticipate possible sample sizes, so cannot make a statistical prediction.

Source: FJC documentation.

Additionally, there are more proposals that are variations of the above or combinations of the above. Some of these possibilities have more potential than others. Generally, methods that rely principally on empirical data on actual case characteristics and judge behavior (e.g., time expended on cases) are more appropriate than those that rely principally on qualitative data because statistical methods can be used to estimate the accuracy of the resulting workload measure.

Conclusions

Overall, the methodology used to develop the district court case weights is reasonable, and the resulting case weights are a reasonably accurate measure of district court judge case-related workload. However, the weights are about 10 years old, and the time data on which they are based are as much as 15 years old. Consequently, it is uncertain whether the case weights continue to be a reasonably accurate measure of the average district judge time burden resulting from a specific volume and mix of cases. The Judicial Conference's Subcommittee on Judicial Statistics has approved a research design for updating the current case weights, about which we have two concerns. The design would rely in large part on data from

two different case management data systems and it will be a challenge to reliably and usefully integrate the data from these two systems for analysis. FJC recognizes this and is developing a strategy for addressing the issue. Second, the design includes limited actual data on the time district judges spend on different types of cases. All the data on noncourtroom time will be based on estimates developed by 13 groups of experienced judges (about 124 in all) using structured, guided discussions. These data cannot be used to calculate statistical measures of the accuracy of the resulting case weights. Thus, it will not be possible to objectively, statistically assess how accurate the new case weights are—weights on whose reasonable accuracy the Judicial Conference will rely in assessing judgeship needs in the future.

The adjusted case filings workload measure used for the courts of appeals is not based on actual data about the time that courts of appeals judges expend on different types of cases. Rather, it represents a policy judgment of the appropriate workload benchmark for considering new judgeships that is based on an analysis of past trends in case filings and merit dispositions. Because of the lack of empirical data on the time demands on courts of appeals judges, neither we nor the judiciary can assess whether adjusted filings is a reasonably accurate measure of the workload of courts of appeals judges. Any methodology to revise the current workload measure that relies solely on qualitative data is unlikely to provide reasonably reliable and verifiable estimates of judges' workload. In 1993, we recommended that the Judicial Conference develop a better measure of the workload of courts of appeals judges. Although the Conference has studied many potential methods of improving its workload measure, it has been unable to agree on any methodology for doing so.

We recognize that a methodology that provides greater empirical assurance of a workload measure's accuracy will require judges to document how they spend their time on a cases for at least some period of weeks. We believe that, given the importance and cost of federal judgeships, this would be a good investment to ensure that the workload measures that are used to support judgeship requests are reasonably accurate and based on the best data available using sound research methods.

Recommendations

We recommend that the Judicial Conference of the United States

- update the district court case weights using a methodology that supports an objective, statistically reliable means of calculating the accuracy of the resulting weights; and
- develop a methodology for measuring the case-related workload of courts of appeals judges that supports an objective, statistically reliable means of calculating the accuracy of the resulting workload measures and that addresses the special case characteristics of the Court of Appeals for the D.C. Circuit.

Agency Comments and Our Response

We provided the Director of the Administrative Office of the United State Courts and the Director of the Federal Judicial Center with a draft of this report for comment. Both provided technical comments, which were incorporated into the report as appropriate. In a May 27, 2003 letter, the Chair of the Committee on Judicial Resources of the Judicial Conference of the United States provided comments (see enc. III) that offered four major observations: (1) the case-related workload in each court district court and court of appeals for which the Judicial Conference has requested one or more judgeships considerably exceed the minimum thresholds the Conference has established for considering additional judgeships in district courts and courts of appeals; (2) we did not provide the full context in which the Judicial Conference uses the district court case weights in assessing district court judgeship needs; (3) the workload of the courts of appeals entail important factors that have defied measurement, including significant differences in case processing techniques; and (4) we did not fully and accurately describe the full context of the new district court case weighting study.

With regard to the first two observations, the scope of our work was limited to an assessment of the relative accuracy of the weighted case filings and adjusted case filings measures of district court judge and courts of appeals judge workload, respectively. Our report clearly states that the workload measures we reviewed are one of many factors the Judicial Conference considers in assessing judgeship needs, although the assessment begins with these workload measures. With regard to the courts of appeals, we recognize that there are significant methodological challenges in developing a more precise workload measure for the courts of appeals. However, using the data available, neither we nor the Judicial Conference can assess the accuracy of adjusted case filings as a measure of the case-related workload of courts of appeals judges. We believe it is premature to conclude that it is not possible to develop a case-related workload measure for courts of appeals judges whose accuracy can be reasonably determined.

The Deputy Director of FJC provided comments in a May 27, 2003 letter (see enc. IV). Both the FJC Deputy Director and the Chair of the Judicial Conference's Committee on Judicial Resources said that we did not fully describe the proposed methodology for updating the district court case weights and why this methodology could produce case weights whose accuracy could be reasonably assessed. We have added language to the report that provides more detail on the iterative Delphi technique that would be used to develop the consensus estimates of the judge time required for noncourtroom events in many different types of cases. FJC agrees that the Delphi methodology would not support the calculation of standard errors for the new case weights, but said that it would allow FJC to assess the integrity of the resulting case weight system. We do not believe that the proposed methodology can be used to assess the accuracy of weights based in large part on consensus data. The Delphi technique of guided, structured discussions inherently relies for its accuracy and reliability on the experience and knowledge of the participating judges and the accuracy and reliability of judges' recall about the average time required for different events in many different types of cases—about 150 if all case types in the current weights were used. The greater the number of events and types of cases for which judges are asked to make estimates, the greater the demands on judges to recall

accurately the judge time required by those events and types of cases. Generally, the Delphi technique is most appropriate when more precise analytical techniques are not feasible and the issue could benefit from subjective judgments on a collective basis. However, more precise analytical techniques are available and were used to develop the current district court case weights. We believe that any methodology used should support the calculation of standard errors. Such statistical measures are essential for assessing the potential error of the weighted case filings for any specific district that has requested additional judgeship(s).

We believe that the importance and cost of creating new federal judgeships requires the best possible case-related workload data to support the assessment of the need for more judgeships. The methodology approved for the revision of the bankruptcy case weights offers an approach that could be usefully adopted for the revision of the district court case weights. The bankruptcy court methodology would use a two-phased approach. First, new case weights would be developed based on the time data recorded by bankruptcy judges for a period of weeks—a methodology very similar to that used to develop the current bankruptcy case weights. The accuracy of the new case weights could be assessed using standard errors. The second part represents experimental research to determine if it is possible to make future revisions to the weights without conducting a time study. The data from the time study can be used to validate the feasibility of this approach. If the research determines this is possible, the case weights could be updated more frequently with less cost than required by a time study. We believe this methodology would provide (1) more accurate weighted case filings than the design proposed for revising the district court case weights and (2) a sounder method of developing and testing the accuracy of case weights that were developed without a time study.

Objectives, Scope, and Methodology

As agreed with your office, our objectives were to (1) determine whether the methods the Judicial Conference uses to quantitatively measure the case-related workload of district court and court of appeals judges results in a reasonably accurate measure of judges' case-related workload, (2) assess the reasonableness of any proposed methodologies to update the workload measures, and (3) obtain information from the AOUSC on the steps the Judiciary takes to ensure that the case filing data required for these workload measures are accurate. To do this, we obtained and reviewed documentation on the methodology used to develop the existing workload measures and proposals to revise those measures from AOUSC and FJC and interviewed officials at both agencies. We based our assessments on our experience with and knowledge of sound research design and generally accepted statistical analysis methods. We also obtained information on the methods the judiciary uses to ensure the accuracy of the case filings data on which the workload measured rely. Although the Judicial Conference considers a number of factors in assessing judgeship needs for the district courts and courts of appeals, our work focused only on the relative accuracy of the weighted case filings and adjusted case filings measures. We did our work in Washington, D.C., in April and May 2003.

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We will send copies of this report to interested congressional committees, the Director, Administrative Office of the U.S. Courts; Director, Federal Judicial Center; and the Chair, Committee on Judicial Resources, Judicial Conference of the United States. We will make copies available to others on request. In addition, this report will be available at no charge on GAO's Web site at http://www.gao.gov.

If you have any questions about this report, please contact me at (202) 512-8777. The key contributors to this report were David Alexander, Kriti Bhandari, Rochelle Burns, and Chris Moriarity.

Sincerely yours,

William O. Jenkins, Jr.
Director, Homeland Security and Justice Issues

Enclosures - 4

Enclosure I

Quality Assurance Steps the Judiciary Takes to Ensure the Accuracy of Case Filing Data for Weighted Filings

Whether the district court case weights are a reasonably accurate measure of district judge case-related workload is dependent upon two variables: (1) the accuracy of the case weights themselves and (2) the accuracy of classifying cases filed in district courts by the case type used for the case weights. If case filings are inaccurately identified by case type, then the weights are inaccurately calculated. Because there are fewer categories used in the courts of appeals workload measure, there is greater margin for error. The database for the courts of appeals should accurately identify (1) pro se cases (2) reinstated cases, and (3) all cases not in the first two categories.

All current records related to civil and criminal filings that are reported to the Administrative Office of the U.S. Courts (AOUSC) and used for the district court case weights are generated by the automated case management systems in the district courts. Filings records are generated monthly and transmitted to AOUSC for inclusion in its national database. On a quarterly basis, AOUSC summarizes and compiles the records into published tables, and for given periods these tables serve as the basis for the weighted caseload determinations.

In responses to written questions, AOUSC described numerous steps taken to ensure the accuracy and completeness of the filings data, including the following:

- Built-in, automated quality control edits are done when data are entered electronically at the court level. The edits are intended to ensure that obvious errors are not entered into a local court's database. Examples of the types of errors screened for are the district office in which the case was filed, the U.S. Code title and section of the filing, and the judge code. Most district courts have staff responsible for data quality control.
- A second set of automated quality control edits are used by AOUSC when transferring data from the court level to its national database. These edits screen for missing or invalid codes that are not screened for at the court level, such as dates of case events, the type of proceeding, and the type of case. Records that fail one or more checks are not added to the national database and are returned electronically to the originating court for correction and resubmission.
- Monthly listings of all records added to the national database are sent electronically to the involved courts for verification.
- Courts' monthly and quarterly case filings are monitored regularly to identify and verify significant increases or decreases from the normal monthly or annual totals.
- Tables on case filings are published on the Judiciary's intranet for review by the courts.
- Detailed and extensive statistical reporting guidance is provided to courts for reporting civil and criminal statistics. This guidance includes information on

general reporting requirements, data entry procedures, and data processing and reporting programs.
- Periodic training sessions are conducted for district court staff on measures and techniques associated with data quality control procedures.

AOUSC did not identify any audits to test the accuracy of district court case filings or any other efforts to verify the accuracy of its electronic data by comparing the electronic data to "hard copy" case records for district courts. Within the limited time for our review, AOUSC was unable to obtain information from individual courts to include in its responses. We have no information on how effective the procedures AOUSC described may be in ensuring that the data in the automated databases were accurate and reliable means of assigning weights to district court case filings.

Enclosure II

Measuring Judicial Workload Using the Collection of Time Study Data

The current bankruptcy court and district court workload measures were developed using data collected from time studies. The district court time study took place between 1987 and 1993, and the bankruptcy court time study took place between 1988 and 1989.

Different procedures were used in these two time studies. The bankruptcy court time study protocol is an example of a *"diary" study*, where judges recorded time and activity details for all of their official business over a 10 week period. The district court time study protocol is an example of a *"case-tracking" study*, where a sample of cases were selected, and all judges who worked on a given sample case recorded the amount of time they spent on the case. Time studies, in general, have the substantial benefit of providing quantitative information that can be used to create objective and defensible measures of judicial workload, along with the capability to provide estimates of the uncertainty in the measures.

Estimating Judge Time in Diary and Case-Tracking Studies

At the conclusion of a case-tracking study, total time spent on each sample case closed during the study period is readily available by summing the recorded times spent on the case by each judge who worked on the case. For a given case type, the summed recorded times can be averaged to obtain an estimate of the average judicial time per case for that case type.

For a diary study, however, it is necessary to make estimates of judicial workload for all cases that were not both opened and closed during the data collection period. This estimation step requires information from the caseload database, and thus the accuracy of estimates depends in part on the accuracy of the caseload data. Two kinds of information are required from the caseload database: case type and length of time the case has been open. Using these data and the time data judges have recorded for specific cases, estimates can be made of the overall time required for cases that were not opened and closed during the calendar period covered by the diary study.

Comparing Case-Tracking Studies and Diary Studies

Each study type has advantages and disadvantages. The following outlines the similarities and differences in terms of burden, timeliness of data collection, post-data collection steps, accuracy, and comprehensiveness.

Burden on Participants

Each study type places burden on judicial personnel during data collection. It is not clear that one study type is less burdensome than the other. The diary study procedure requires more concentrated effort, but data are collected for a shorter period of time.

Timeliness of Data Collection

Data collection for a diary study can be completed more quickly than for a case-tracking study.

Post Data Collection Steps

More effort is needed to convert diary study data to judicial workload estimates than case-tracking study data. Also, the accuracy of estimates from diary study data depends in part on the accuracy and objectivity of the information in the caseload database.

Data Accuracy

It is not clear that one study type collects more accurate data than the other study type. Some of the bankruptcy court case-related time study data could not be linked to a specific case type due to misreporting errors and/or errors in the caseload database. Some error of this type likely is unavoidable because of the requirement to record all time rather than record time for specific cases only. However, it is plausible that a diary study collects higher quality data, on average, because all official time is to be recorded during the study period; judicial personnel become accustomed to recording their time. In contrast, the data quality for a case-tracking study could decline over the study's length; for example, after a substantial proportion of the sample cases are closed, judicial personnel could become less accustomed to recording time on the remaining open cases.

Comprehensiveness and Efficiency

In theory, a case-tracking study collects more comprehensive information about judicial effort on a given case than a diary study, because data for a sampled case almost always are collected over the duration of the case. (Data collection may be terminated for a few cases that remain open, or are reopened, many years after initial filing.)

With the diary approach, the total judicial time that is required for lengthy case types is estimated by combining "snap shots" of the time required by such cases of different ages. Thus, in theory, producing accurate weights for lengthy case types is not problematic. In practice, however, difficulties may be encountered. For example, in the 1988-1989 bankruptcy time study, the asset and liability information for cases older than 22 months was inadequate and appropriate adjustments had to be made. In addition, difficulties may arise if only a small number of cases of the lengthy type are in the system. This is an issue FJC said it is considering as it finalizes how to assess the judicial work associated with mega cases in the upcoming bankruptcy case-weighting study.

Enclosure III

Comments from the Chair of the Judicial Resources Committee, Judicial Conference of the United States

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
DENNIS JACOBS
CIRCUIT JUDGE

UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, NEW YORK 10007

May 27, 2003

William O. Jenkins, Jr.
Director, Homeland Security and Justice Issues
General Accounting Office
441 G Street, NW
Washington, DC 20548

RE: Draft correspondence on "Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships" (GAO-03-788R)

Dear Mr. Jenkins:

Thank you providing a draft copy of "Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships" for comment. The time constraint is such that my comments are less comprehensive than I would wish. But I do want to convey a few salient observations.

The General Accounting Office (GAO) finds that the current case weights used in formulating the judiciary's judgeship requests are "reasonably accurate" and based on a "reasonable" methodology. The focus of the critique is on the techniques for fine-tuning those numbers over time. I have three observations.

1. All of the current judgeship requests pending before Congress are to augment courts in which the workloads far outstrip the threshold standards reflected by the formulas. Thus, although the guideline for district courts is a weighted caseload of 430, all of the requests for additional district judgeships are for courts in which the weighted caseload per judgeship is 491 and higher. Similarly, although the guideline for circuit courts is an adjusted caseload of 500, all of the requests for additional circuit judgeships are for courts in which adjusted filings per panel are 583 and higher. These workloads transcend any deviations that superior fine-tuning could correct.

2. The GAO report does not explain the role of the case weights in the full context of the process through which the Judicial Conference develops its judgeship recommendations. While important to the Judicial Conference's process for evaluating judgeship needs in the district courts and courts of appeals, the weighted caseload in an individual court is only the starting point. A recommendation to create a new judgeship is not strictly formulaic in any sense, and is based on numerous other factors considered after a court has satisfied the guideline of 430 weighted filings per district judgeship or 500 adjusted filings per circuit panel. These factors include: a) careful review of the court's use of senior, visiting, and magistrate judges to assist in handling the caseload; b) consideration of whether the court's workload situation may be transient (and would not therefore justify recommending an additional judgeship even if weighted filings are in excess of the guideline); c) review of the court's use of alternative dispute resolution or other methods to better manage caseload; and d) consideration of a temporary (rather than permanent) judgeship if the caseload level justifying an additional judgeship arose only in the most recent years, or when an additional judgeship would reduce the court's per judgeship or panel caseload close to the guideline.

Moreover, the development of a judgeship recommendation requires several levels of review involving the collective judgment of the individual court, the circuit judicial council, the Subcommittee on Judicial Statistics, the Judicial Resources Committee, and the Judicial Conference. It is a reasoned, conservative approach that results in requests for far fewer judgeships than would be called for by a mechanical application of caseload guidelines. This is true for circuit judgeships as well as district judgeships.

As to the circuit courts, a simpler methodology is used to calculate the adjusted filings. This methodology has served the judiciary's needs for developing the baseline for considering requests for additional appellate judgeships. The judiciary has considered various other methodologies over the last several years, but the workloads in the courts of appeals entail important factors that have defied measurement, including the significant differences in the courts' case processing techniques.

3. I am disappointed that the GAO report does not fully or accurately depict the context of the new district court case weighting study. This study, which involves no changes to the role of weighted filings in the decision-making process, is intended to serve as a bridge from the current set of weights to an updated set that takes into account the legislative and case-management changes occurring in the past ten years. The Subcommittee on Judicial Statistics, which is a subcommittee of the Judicial Resources Committee, does not intend to start from scratch; it will use substantial data already collected and the current case weights will serve as "anchors" in the development of

updated case weights. Moreover, the report does not adequately describe the sophisticated methodology designed by the Federal Judicial Center (FJC) for collecting input from judges. The Committee was informed by the FJC that the Delphi technique is commonly used and is a scientifically valid way of developing this kind of information from subject matter experts, such as from judges about the work of judges. I am advised that numerous state court systems apply this technique for developing case weights and judgeship formulas. While the GAO observes that other techniques may be even more statistically accurate, the GAO does not consider the substantial increased costs and time delays involved in attaining what we believe is likely to offer little or no added value for the investment.

The Judicial Resources Committee and its Subcommittee on Judicial Statistics take very seriously our responsibilities for proposing effective case weight formulas, for identifying other factors that affect judgeship needs, for assisting courts in weighing and coping with their needs, for scrutinizing every request, and for ensuring that our judgeship requests are based on sound and rigorous requirements.

Sincerely,

Dennis Jacobs
Chair, Committee on Judicial Resources

Enclosure IV

Comments from the Federal Judicial Center

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May 27, 2003

William O. Jenkins, Jr.
Director, Homeland Security and
Justice Issues
General Accounting Office
Washington, D.C.
jenkinswo@gao.gov

RE: Draft correspondence on "Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships" (GAO-03-788R)

Dear Mr. Jenkins:

This responds, on behalf of the Federal Judicial Center, to your May 22 letter inviting agency comment on the draft correspondence referenced above, prepared by your office at the request of the Chairman of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property. We have provided you technical comments separately, as you requested.

The relatively brief time you were able to provide us to review the draft correspondence, although understandable in light of the project schedule, obliges us to limit our comments to pp. 9-11 ("Research Design for Updating District Court Case Weights Raises Concern"). The research design prepared by the Center for the Judicial Resources Committee's Statistics Subcommittee, and approved with some modification by the Subcommittee, differs in several ways from the methods used to calculate the current weights. We anticipate that this design will yield reliable case weights and provide the additional benefits that you describe at p. 9—reduced burden on judges (and, we note, on staff both in chambers and in the clerks offices), potential cost savings, and more rapid development of the weights for use in the judgeship estimation process.

Your description of the research design (p. 10) is basically accurate but, as a brief summary, omits some necessary elements that, we believe, should allay the two concerns that you express about the design.

You note first the challenge that we will face in obtaining necessary data from the different automated systems that the district courts will be using during the study. We recognize this challenge, as you note, and have taken several steps to meet it. One is the formation of the FJC-AO-courts technical advisory group that you describe at p. 10. In

addition, we will survey court operations managers about docketing practices and systems to ensure that procedures for extracting data account for important differences among courts. We have also identified collateral data sources that we will analyze for event information (e.g., JS-10 data and PACER docket sheets) if extractions from individual courts prove problematic.

Second, you are concerned that the design will not require judges to record contemporaneously the time they spend on cases. Case weights developed from the new study will rely on two categories of time expenditure measures: actual and estimated time. We agree that the method used to obtain estimated time expenditures will not permit the calculation of a standard error term around a resulting time estimate and therefore a case weight, and thus, in that sense, the resulting case weights might be considered somewhat less objective than would case weights using data derived from a properly executed diary or case-tracking study.

We disagree, however, that the absence of standard error calculations will preclude us from assessing the integrity of the resulting case weights system, because we will rely on the alternative procedures described below. Specifically, we will use a variation of the Delphi method to obtain estimates of the time required to complete various case activities. The Delphi method, widely used in state courts to develop weighted caseload measures, is an iterative process designed to produce consensus decisions among participating experts. In this study, district judges are the experts and their task is to decide on appropriate estimates of the average time district judges expend on specific case-related events.

The first step in this process will be to convene representative groups of eight to thirteen district judges, meeting within each of the 12 regional circuits (approximately 100 judges in all) to obtain time estimates that represent the cases and practices within the circuit. Each work session will take place over one-and-a half to two days; Center staff will facilitate each session, using a standardized protocol.

The activities that the groups of judges will assess in these individual work sessions will include such events as conducting a conference, conducting a motion hearing, preparing an order on a dispositive motion, preparing an order on a discovery motion, and preparing to begin trial. We will provide the judges with a default value for each event, in order to anchor their initial time judgments. Accurate default values can be expected to enhance the reliability of the judgment process. About half of the default values are derived from actual time-reports that were either collected from judges during the 1993 case weights study or were reported on JS-10 forms.[1] Judges will be encouraged to depart from the

[1] The default values derived from JS-10 reports will be obtained by regression analysis. Independent variables are frequency counts for specific nontrial proceedings and the dependent variable is time expenditure (in half-hour increments). The values so derived represent averages that make no distinction among case types. These default values may represent sound estimates for most case types, but circuit-based judge groups may find them inappropriate for some case types. If the judge groups conclude that a default value does not apply to a given case type, they are likely to depart from the JS-10 defaults, despite the defaults having been derived from objective data.

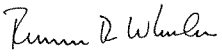
default values only if their experiences, revealed in the focused interchanges in the circuit meeting, suggest that a departure will improve the accuracy of the estimate. We expect such departures to result in case type-specific event estimates that are both above and below the default value.

Following this series of meetings, a national group of 24 judges (2 from each circuit, some of whom may have participated in the circuit-based meetings) will consider the information provided by the circuits, and using structured procedures, will arrive at consensus estimates for case activities that best represent the national practice.

Although this method does not permit a statistical assessment of standard error for consensus-based estimates, the method can be evaluated on the basis of adherence to the procedures, summarized above, that we will use to gather the data and promote their reliability.

The Federal Judicial Center appreciates the opportunity to comment on the draft correspondence. Please contact me or members of the project team if you need additional information.

Cordially,



Russell Wheeler

(440195)

Mr. SMITH. Thank you, Director Jenkins.
Professor Hellman?

STATEMENT OF ARTHUR D. HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you. I want to thank Congresswoman Hart for those generous comments, and I also want to thank the staff for assistance that they have provided.

My comments today will concentrate of the Federal Courts of Appeals because those are the courts that I know best, but much of what I have to say also applies to the District Courts. I will begin by answering the question posed in the title of the hearing: "Is There a Need for Additional Federal Judges?" The answer is yes, there is a need, and a good place to start in meeting that need is with the request submitted by the Judicial Conference that you have described and that Judge Jacobs has described.

I support the Judicial Conference request for two reasons. First, I believe that the process followed by the Judicial Conference does assure that a request will not be submitted to Congress unless there's strong evidence of a need for additional judgeships in that particular court. Judge Jacobs has outlined that process and the administrative office has provided to each Member of the Judiciary Committee an in-depth analysis of each of the court included in that request.

Second, my own studies of the Federal appellate courts leave no doubt in my mind that additional judgeships are warranted. Judge Jacobs presented some of the caseload data. In concrete terms, one way of seeing this is that four appeals are being filed today for every three that were being filed when Congress last created new judgeships for the appellate courts. Now, Federal appellate judges were not under worked 15 or 20 years ago, and it would seem almost self evident that caseload increases on that magnitude would require additional judge power. So I do support the Conference request.

Where I part company with the Conference is in expressing concern about something that is missing from the request. The two Courts of Appeals that have the highest adjusted filings, per judge filings also, are the Fifth and Eleventh Circuits, and the Fifth, Mr. Chairman, your own circuit. Judges in those circuits are deciding cases at the rate of 750 or more each year. In the Eleventh Circuit filings have almost tripled since the Court was created almost two decades ago, but the Court still has the same 12 judgeships that it had then. But there is no mention of either of those courts in the Judicial Conference submission. The reason lies in an important aspect of the Judicial Conference process. The Subcommittee on Judicial Statistics that you have heard about today will not recommend any additional judgeships for a Court of Appeals unless a majority of the active judges submit a request. If additional judgeships appear to be justified by the workload statistics, but no judges are requested, the Court is required to explain its position, but as far as I am aware, that explanation is final, it is not subject to review by any entity within the Judicial Conference, and it is not public.

Now, the Fifth and Eleventh Circuits have for some years taken the position that they do not want to become larger than they already are. I think that position is misguided, and in my statement I have explained why. But my main concern here today is not with the merits of that position but with the process. I don't think that process serves Congress as well as it could, and I don't think it serve the Judiciary very well either.

I've offered two principal suggestions, first that the process should be made more public with an opportunity for participation by members of the legal community, and second, a negative response by a majority of the active judges on the court should not stand as an absolute barrier to any consideration of further judgeships. I think that making the process more open and allowing broader participation would give Congress more information that it needs, it would give the judges more information that they should have, and also, I think that by involving the legal community in the formulation of the judgeships requests, the Courts can build a constituency that will help them in the many battles that they have to fight today.

So, in conclusion, I agree with Judge Jacobs in urging the sub-Committee to support the modest request approved by the Judicial Conference. I would also urge the Conference to consider modifications of its process that will allow for broader participation in the formulation of judgeship requests because I do think that a more open process will benefit both Congress and the Judiciary.

Thank you, and I look forward to questions.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to express my views at this important oversight hearing on "The Federal Judiciary: Is There a Need for Additional Federal Judges?" In my comments today, I will concentrate on judgeship needs in the federal courts of appeals, because those are the courts that I know best. However, I will also address the methodological issues raised by the May 30, 2003 report from the United States General Accounting Office.

By way of personal background, I am a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh School of Law. I have been studying the operation of the federal appellate courts for more than 25 years, starting in the mid-1970s, when I served as Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission).

Since my days at the Hruska Commission, I have organized and participated in many other studies of the federal appellate courts. In the late 1980s I supervised a distinguished group of scholars in analyzing the innovations of the Ninth Circuit and its court of appeals. Not long after that, I was selected by the Federal Judicial Center to carry out a study of unresolved intercircuit conflicts requested by Congress in the Judicial Improvements Act of 1990. More recently, I served on the Ninth Circuit Court of Appeals Evaluation Committee appointed by Chief Judge Procter Hug, Jr. Of course, in my testimony today I speak only for myself; I do not speak for any court or other institution.

Part I of this statement sets forth my views on the judgeship request endorsed by the Judicial Conference of the United States (JCUS or Judicial Conference) at its meeting in March 2003. Part II discusses what is perhaps the most striking feature of the request: the omission of any mention of the Fifth and Eleventh Circuits, the courts of appeals with the highest per-judgeship filings in the nation. Part III offers suggestions for improving the process by which the Judicial Conference formulates the judgeship recommendations that it submits to Congress.

I. THE JUDICIAL CONFERENCE REQUEST

On March 18, 2003, the Judicial Conference of the United States, the policy-making body of the federal judiciary, asked Congress to create 57 new Article III judgeships—11 for the courts of appeals and 46 for the district courts. I support this request and urge the Subcommittee to act favorably upon it. I will discuss separately the judgeship needs of the two sets of courts.

A. Judgeships for the courts of appeals

The Judicial Conference has requested 11 new judgeships for the federal courts of appeals: 1 for the First Circuit, 2 for the Second Circuit, 1 for the Sixth Circuit, and 7 for the Ninth Circuit (5 permanent, 2 temporary). I support this request for two reasons. First, the process followed by the Judicial Conference assures that a request will not be submitted to Congress unless there is strong evidence of the need for additional judgeships in the particular circuit. Second, my own studies of the federal appellate courts leave no doubt in my mind that additional judgeships are warranted. Indeed, the Judicial Conference request may understate the need.

1. The Judicial Conference process

As Judge Dennis G. Jacobs has explained, the Judicial Conference does not request additional appellate judgeships solely on the basis of any formula, nor is it sufficient that a particular court of appeals believes that new judgeships are needed. Rather, the Judicial Conference follows an elaborate process involving multiple stages of review and a variety of criteria both quantitative and non-quantitative. The process is generally referred to as the "Biennial Survey of Judgeship Needs."

Judge Jacobs, who is the chair of the Judicial Conference Committee on Judicial Resources, has described the process in several forums, and I will not go over the same ground here. However, one point is worth emphasizing. In his statement to the Subcommittee on the Constitution in the 107th Congress, Judge Jacobs reported that in the judgeship needs survey of 2000, the various federal courts requested a total of 78 additional judgeships (some permanent, others temporary). But in the course of the various stages of review, "that number was eventually reduced to the 63 initially recommended by the Conference in July 2000." This means that almost 1 out of 5 judgeships requested by the individual courts did not make it through the review process to the request submitted to Congress. This strikes me as strong evidence that the review process is serious and rigorous.

Further evidence can be found in the documentary material that the Judicial Conference has furnished to Congress in support of its requests. The detailed analysis of caseload trends, court practices, and available judgepower instills confidence that the recommendations are justified.

2. Justifications for the request and the GAO study

In concluding that the Judicial Conference request for 11 new appellate judgeships is fully warranted, I also rely on my own research on the work of the federal courts of appeals. No new judgeships have been created for any federal court of appeals since 1990. During that time, federal appellate caseloads have continued to grow. For example, from 1991 through 2002, filings nationwide increased from 43,027 to 57,555. In concrete terms, this means that 4 appeals are being filed today for every 3 that were filed when Congress last created new judgeships. Federal appellate judges were not underworked 15 or 20 years ago, and it would seem almost self-evident that caseload growth on this scale would require additional judgepower.

Against this background, the General Accounting Office (GAO), in a report submitted to Chairman Smith on May 30, 2003, raised some questions about the statistical methods used by the Judicial Conference in formulating its requests for new appellate judgeships. These deserve brief comment.

The GAO report focuses on two aspects of the Judicial Conference method: the weight of one-third given to pro se appeals and the use of 500 "adjusted filings" per three-judge panel as the base standard.

With respect to the first point, it is true that the Judicial Conference did not carry out empirical research to determine the judge time required by pro se cases as distinguished from counseled appeals. In an ideal world with no limit on resources, such an undertaking would no doubt be valuable. But in the real world of limited resources, I do not think it is necessary. When an appeal is filed by a lawyer on behalf of a client, professional norms as well as ethical obligations generally assure that the appeal will have sufficient merit to require more than a de minimis amount of judge time. That assurance is lacking when an appeal is filed by a litigant (generally a non-lawyer) acting for himself. The 3:1 ratio applied by the Judicial Conference strikes me as a reasonable (if unscientific) effort to quantify the difference.

Moreover, we do have some empirical data about the relative demands on judge time of pro se and counseled cases. A few years ago, the Federal Judicial Center (FJC), the research arm of the federal judiciary, carried out a study of case management practices for the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). In contrast to the statistical tables issued by the Administrative Office of United States Courts (A.O.), the FJC did offer some detailed breakdowns of pro se and counseled cases. Two are of particular interest in the context of case weighting.

As this Subcommittee is aware from its oversight hearing last summer, one of the most time-consuming responsibilities of an appellate judge is writing an opinion for publication. The Federal Judicial Center study indicates that in 1998, only 4% of pro se appeals received a published opinion, while 38% of counseled cases did so. Interestingly, the percentage for pro se appeals varied widely among the circuits. One circuit, the Fourth, appears to have a policy of not publishing opinions in pro se cases. At the other end of the spectrum, two circuits (the D.C. and Seventh Circuits) published opinions in 9% of pro se cases.

Another useful proxy for judge time is oral argument. The FJC study tells us that 57% of the counseled appeals received oral argument in 1998, while only 6% of the pro se cases did so. (The report does not give the figure for pro se appeals, but it can be calculated from the data that are included.) Here too there was wide variation among the circuits, with Judge Jacobs's circuit, the Second, allowing oral argument in almost one-third of the pro se cases.

Based on this information, the weight of one-third for pro se cases certainly seems justified. Indeed, one might argue that pro se cases should be discounted even more. However, for several reasons, I do not suggest this step. First, as already noted, the circuits vary greatly in their treatment of pro se cases. It would not be desirable to penalize circuits that are more generous in allocating time to pro se appeals. Second, further discounting of pro se appeals might become a self-fulfilling prophecy, leading judges (even unconsciously) to pass too hurriedly over some appeals that after further study would be seen to have merit. Finally, appearances matter. The judiciary should take care not to give the impression that one class of litigants is being accorded second-class status. (Even the current weighting may have that effect, but the very fact that the available data would justify heavier discounting gives some legitimacy to the practice.)

The second focus of the GAO study is the baseline figure of 500 adjusted filings per three-judge panel. In response, Judge Jacobs has pointed out that "all of the requests for additional circuit judgeships are for courts in which adjusted filings per panel are 583 and higher." Thus, the workloads of the four courts "transcend any deviations that superior fine-tuning could correct."

I agree with Judge Jacobs's observation, but I am not certain that it fully addresses the concern expressed by the GAO report. The GAO appears to be saying, not simply that the standard could be made more precise, but that "there is no empirical basis for assessing" whether the standard is accurate at all. In other words, the GAO seems to be asking: Why 500 adjusted filings per three-judge panel? Why not 400? Why not 600?

The GAO itself offers part of the answer:

> At the time the current measure was developed and approved, using the new benchmark of 500 adjusted case filings resulted in judgeship numbers that closely approximated the judgeship needs of the majority of the courts of appeals, as the judges of each court perceived them. The current court of appeals case-related workload measure principally reflects a policy decision using historical data on filings and terminations.

Perhaps more to the point, the benchmark resulted in judgeship numbers that closely approximated the actual allocations for most of the circuits.

In my view, the use of a historically based approach is quite defensible. Traditionally, Congress has been reluctant to expand the Article III judiciary any more than necessary. No new appellate judgeships have been created for more than a decade. Under these circumstances, it would make little sense for the Judicial Conference to come up with requests that deviated sharply from existing allocations. For example, if the Judicial Conference were to assert that one or more circuits should have double the number of judgeships they now have, its request would be met with incredulity. At the same time, in view of the substantial increase in volume of appeals over the last two decades, it would be equally incredible to say that the regional circuits are overstaffed.

3. Assessing the appellate baseline

In supporting the request for additional appellate judgeships, I do not rely on the historical approach alone. Although the available data are not as complete or detailed as one would like, they do allow us to get a good sense of what the JCUS standard means in practice. Viewing the standard in this way, I am confident that the Judicial Conference has indeed taken a conservative approach in assessing court requests for new positions.

As it happens, the circuit whose workload most closely approximates the JCUS starting-point is my own circuit, the Third. In 2002, the Third Circuit's adjusted filings were 529 per panel—about 5% more than the level that would allow consideration of a request for new judgeships. (In fact, the Judicial Conference has not recommended any additional judgeships for the Third Circuit. The court will remain a court of 14 active judges.)

The 2002 Judicial Caseload Profile shows that the court's adjusted filings of somewhat more than 500 per panel translated into 381 terminations on the merits per active judge. "Terminations on the merits" comprise the cases actually decided by the judges after oral argument or submission on the briefs. The figure thus excludes procedural terminations that require no judicial action. Further, this particular statistic does not count participations by senior judges and visiting judges. It is thus a useful starting-point for considering what the baseline means as a measure of the day-to-day responsibilities of the judges in regular active service.

We know from other A.O. data that the Third Circuit issues a published (i.e. precedential) decision in about 16% of its merits decisions. (Here and elsewhere in this analysis, numbers have been rounded.) This translates to about 60 cases per active judge. Most cases, of course, are decided by three-judge panels, with one judge writing the opinion for the court. If we assume that the active judges participate in a roughly equal basis in the court's work, we can calculate that each active judge would be responsible for authoring 20 opinions and reviewing 40 opinions written by other judges. In fact, a Westlaw search yields almost precisely those numbers—20 authored opinions and 64 participations per judge in "reported" cases.

What about the other 84% of the decisions? The court distinguishes between counseled and pro se appeals. Starting on January 1, 2002, non-precedential opinions in counseled cases have been posted on the court's web site and made available to Westlaw and Lexis. A Westlaw search indicates that in the course of that first year under the new procedure, each active judge participated in an average of 150 counseled cases that yielded a written non-precedential decision.

Finally, there are the unpublished decisions in pro se appeals. It appears that in the course of a year an active judge will participate in the adjudication of 170 such cases. The A.O. describes these as "reasoned" dispositions, which are defined as "opinions and orders that expound on the law as applied to the facts of each case and that detail the judicial reasons upon which the judgment is based." Only a handful of the Third Circuit's dispositions on the merits are issued "without comment."

With this information, we can begin to measure the individual judges' labors that correspond to the Judicial Conference benchmark of 500 adjusted filings per panel. To do this, we must first take account of the judges' obligations other than the disposition of argued and submitted cases. These include committee work, Judicial Conference activities, motions, and petitions for rehearing en banc. Let us assume that each judge spends the equivalent of three weeks each year on these activities. (That is probably a conservative estimate.) Each judge will also sit on an oral argument calendar during seven weeks of the year; those weeks will be largely unavailable for other judicial activities. Finally, let us assume that each judge will take two weeks of vacation. This leaves no more than 40 weeks for work on argued and submitted cases. For purposes of analysis, it is helpful to divide these 40 weeks into 20 two-week periods.

In each two-week period, the judge must complete a substantial opinion "for publication." At the Subcommittee hearing last June on unpublished appellate opinions, Judge Alex Kozinski of the Ninth Circuit Court of Appeals described the intense, in-depth work that goes into the writing of a published opinion:

> A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also

make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

While some opinions will require only a few days' work, others will require much more than that. And because the court publishes an opinion in only one-sixth of its cases, there is no chaff—no routine affirmances to bring down the average.

In the course of the two-week period, the judge must also give close attention to 2 other precedential cases in which another panel member is writing the opinion. Even without the burden of authorship, the responsibilities are substantial. Each participating judge must examine the relevant materials, both legal (precedents, legislative history, scholarly commentary, and the like) and factual (particularly the record of the proceedings in the lower court). Each judge must think carefully about the issues and their implications for future cases. And each judge must do his or her best to assure that the opinion articulates the holding and the rationale in a way that lawyers and other judges can understand and apply.

Finally, the judge must also participate in about 16 cases that will not become precedential. In these cases, the judge need not worry about the precise phrasing of the opinion or the implications of the ruling for the future development of the law. But we would certainly want the judge to study the law and the record in sufficient depth to be confident that the outcome is correct and that the panel has not overlooked prejudicial error or unfairness in the court below.

The numbers in this analysis are not precise. But they are solid enough to justify the conclusion that the Judicial Conference baseline of 500 adjusted filings per panel is at least reasonable. Indeed, if anything, it may err on the side of underestimating judgeship needs. According to the Federal Judicial Center study, the Third Circuit is one of only three circuits that hear oral argument in less than half of the counseled appeals. And the Third Circuit is second lowest in the percentage of counseled cases that are decided by published opinion. To the extent that these percentages reflect the pressure of caseloads, one might argue that the addition of one or two judges would enable the court to better serve the legal community of the circuit.

B. Judgeships for the federal district courts

The Judicial Conference has recommended a total of 46 new judgeships for the federal district courts. Here too the request is grounded in an elaborate and rigorous process that promotes a high degree of confidence in the product. And here too, a review of the supporting material submitted to the members of the Judiciary Committee makes clear that the JCUS Subcommittee on Statistics dug deeply into the numbers and closely investigated the non-quantifiable factors that bear on judgeship needs.

Although I have not studied the district courts as I have the courts of appeals, I share Judge Jacobs's skepticism about how much can be gained through rigorous fine-tuning of the case weighting system. For one thing, the "nature of suit" codes can be only rough proxies for judge time nationwide. Habeas corpus cases, for example, may be more time-consuming in one district than another because of variations in state post-conviction practices. Further, efforts to fine-tune the standard would aim at a moving target. To take one recent illustration, the changes made by Congress this year in child pornography laws and sentencing procedures may well affect the amount of time judges will have to spend on a variety of criminal cases.

C. A better approach

For the reasons I have given, I agree with Judge Jacobs that fine-tuning the standards for adjusted filings (for the courts of appeals) and weighted filings (for the district courts) is not likely to assist Congress in determining whether to create new Article III judgeships. At the same time, I think that the system does not serve Congress as well as it could do. What is needed is not greater precision in the statistics, but rather a wider range of non-quantitative information, including the views of lawyers and other citizens. In Part III of this statement I offer some suggestions for modifying the process used by the Judicial Conference in formulating its judgeship recommendations. A more open process, I believe, will provide significant benefits to the judiciary as well as to Congress.

II. THE MISSING CIRCUITS

To anyone who follows the work of the federal courts of appeals, the most striking aspect of the Judicial Conference request is something that is not there—a recommendation for new judgeships for the Fifth and Eleventh Circuits. In all four courts of appeals on the Judicial Conference list, as Judge Jacobs has pointed out, adjusted filings are well above the minimum of 500. The figures range from a low

of 583 (in the Sixth Circuit) to a high of 870 (in the Ninth Circuit).[1] But if we look at the Fifth Circuit, we find that adjusted filings in 2002 were just short of 1000—double the baseline for consideration of a judgeship request. And in the Eleventh Circuit, adjusted filings totaled an astounding 1112 per panel. (These figures represent my own calculations, based on the Judicial Conference formula.)

To give you some sense of what these figures mean, the most conservative of the Judicial Conference appellate recommendations is the request for the Second Circuit. With 2 additional judges, and assuming no increase in the volume of appeals, the Second Circuit's adjusted filings would drop to 614 per panel.[2] Under that standard, the Fifth Circuit would be entitled to as many as 28 judgeships rather than the 17 it has now. Under that same standard, the Eleventh Circuit could grow from 12 active judges to 22, almost doubling its size. Yet the Judicial Conference did not recommend a single additional judgeship for either court.

The absence of a request for the Eleventh Circuit is particularly remarkable. The Eleventh Circuit was created in 1981 when Congress divided the former Fifth Circuit into two new circuits. At that time the Eleventh Circuit was a court of 12 judgeships and 2,556 filings. Today, the Eleventh Circuit is still a court of 12 judgeships. But filings are now 7,472—almost three times what they were when the court was established. Yet the Eleventh Circuit is not even mentioned in the Judicial Conference submission.

The explanation for this apparent anomaly lies in an important aspect of the Judicial Conference process that I have not yet mentioned. The Subcommittee on Judicial Statistics—the body that initiates the Biennial Survey—will not recommend any additional judgeships for a court of appeals unless a majority of the active judges of the court submit a request. If additional judgeships appear to be justified by workload statistics, but no judgeships are requested, the court is required to explain its position, but as far as I am aware, that explanation is final and is not subject to review by any entity within the Judicial Conference. Further, it appears that one recognized explanation is that the court is opposed to adding judges notwithstanding its increased workload.

My understanding is that the Fifth and Eleventh Circuits have for some years taken the position that they want to remain "small," or perhaps more accurately that they do not want to become larger than they already are. Under the existing Judicial Conference system, that determination stands as an absolute bar to any recommendation by the Judicial Conference for new judgeships, no matter how strongly the Judicial Conference's own standard might suggest that at least some new positions are needed.

The judges of the two circuits have offered several reasons why they resist expanding the size of their courts. Primary among these is the concern that adding judges will lead to a decline in the "coherence and uniformity of the law." A leading proponent of this view is the former chief judge of the Eleventh Circuit, Judge Gerald B. Tjoflat. Judge Tjoflat believes that as a court grows larger, "the clarity and stability of the circuit's law suffers." That, in turn, "increases litigiousness and complicates the disposition of cases."[3]

For two reasons, I am skeptical about this line of argument. First, over the last decade and a half, I have carried out extensive empirical research on the largest of the federal appellate courts, the Ninth Circuit. This research does not support the claim that the Ninth Circuit Court of Appeals has been unable to maintain consistency in its decisions. Nor does it validate the criticisms of the Ninth Circuit's "limited en banc court," unique among the federal courts of appeals. I particularly call your attention to the study summarized in my article, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. Pitt. L. Rev. 1029, 1088–1100 (1999).

Yet even if this research is not persuasive, I believe that the judges' position is problematic for a more fundamental reason. The judges' concern is focused on what has been called "the law-declaring function of appellate courts."[4] That function is certainly important; indeed, I have devoted much of my academic career to studying it. Nevertheless, that function is secondary. The primary function of the federal courts of appeals is to do justice—and to be seen as doing justice—in the individual cases and controversies that come before the court.

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[1] The figures are given in the chart attached to the press release issued by the Administrative Office on March 18, 2003, announcing the Judicial Conference judgeship request.

[2] This is the figure given in the detailed justification material that the Administrative Office has provided to each member of the Judiciary Committee.

[3] Gerald B. Tjoflat, More Judges, Less Justice, A.B.A. J., July 1993, at 70–71.

[4] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 47 (1998).

I fear that the judges of the Fifth and Eleventh Circuits, in their zeal to protect the law-declaring function of their courts, may not be giving sufficient attention to the effect of their policy on the quality of appellate decision making. As the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission) recognized in its Final Report, there comes a point when the streamlining of procedures begins to compromise "the appearance of legitimacy of the appellate process [and] the quality of appellate justice."[5] When individual judges are deciding cases at the rate of 750 or more each year—as is happening in the Fifth and Eleventh Circuits—one must wonder whether that point has been reached.[6]

I have no doubt that the judges of the Fifth and Eleventh Circuits believe that they are giving adequate attention to the cases and have not compromised any of the essential functions of an appellate court. But I am not confident that judges can necessarily recognize when they have gone too far in relying on procedural shortcuts or when they have begun to delegate responsibilities that they should be undertaking themselves. For example: Do the judges too readily accept the drafts of precedential opinions prepared by their law clerks? Do panel members sign on to the authoring judge's opinion without carefully scrutinizing the statements of law or the rationale? Do the second and third judges on a screening panel defer too much to the judge who initially reviewed the case? These are not lapses that occur overnight. Change is gradual and incremental, as judges imperceptibly find themselves adopting practices that they would have rejected when caseload pressures were less exigent.

Is there any way of determining whether judges on a particular court of appeals have gone too far in delegating the performance of Article III functions? I do not think we will find any "smoking gun." But one possible indicator is the ratio of central staff attorneys to active judges. On this point the Federal Judicial Center report provides the most recent information available. That report indicates that most of the circuits have 1 or 2 staff attorneys for each active judge. Two circuits do not follow this pattern. The Fifth Circuit, with 17 authorized judgeships, employs 55 staff attorneys at court headquarters in New Orleans. The Eleventh Circuit, with only 12 authorized judgeships, employs a total of 41 staff attorneys. The ratio of staff attorneys to judgeships in both circuits is thus more than 3 to 1.

It would be wrong to jump to conclusions based on this one set of data, but there is more. First, I assume that the judges have their full complement of "elbow clerks;" currently, each active judge may hire 4 clerks to work in the judge's chambers. Thus, the 12 active judges of the Eleventh Circuit are supervising, directly or indirectly, a corps of almost 90 law clerks and staff attorneys. Second, the Fifth and Eleventh Circuits rank among the lowest in the percentage of counseled cases that receive oral argument.

I recognize that there may be circumstances, not reflected in case management data, that make the volume of appeals more manageable in the Fifth and Eleventh Circuits than an equivalent volume would be elsewhere in the nation. Perhaps the docket is more homogenous in subject matter, so that the judges encounter a higher proportion of cases with familiar issues than do their counterparts in other circuits. Perhaps there is less disagreement among the judges, so that panel members need spend little time in writing dissents, negotiating the language of majority opinions, or exchanging memos on whether to rehear cases en banc.

These hypotheses are appropriate subjects for research. But even if these circumstances exist, I must admit to some doubts that they would adequately explain the extremely high per-judge disposition rate in the Fifth and Eleventh Circuits. Further, some members of the two courts have voiced concerns similar to those I have expressed. In 1992, Judge (now Chief Judge) Carolyn Dineen King of the Fifth Circuit acknowledged that "the sheer volume [of cases] has had an adverse impact on the number of decisions that we can fairly claim have been fully considered and understood."[7] In 1997, then-Chief Judge Joseph W. Hatchett of the Eleventh Circuit described in detail the consequences of the procedures adopted by his court and concluded that "litigants of this circuit would be better served if this court had [2 or 3 more] active judges."[8]

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[5] Id. at 25.

[6] The figures given in the Federal Court Management Statistics for 2002 are 758 for the Fifth Circuit and 843 for the Eleventh Circuit. The Fifth Circuit's figure is almost exactly double what it is in the Third Circuit. Part I(A) (3) of this statement examines what the Third Circuit figure means in practice.

[7] Hon. Carolyn Dineen King, A Matter of Conscience, 28 Hous. L. Rev. 955, 958 (1991). Although the article has a publication date of 1991, it is based on a speech delivered in 1992.

[8] Hon. Joseph W. Hatchett, 1997 State of the Circuit Address at 11 (on file with author).

Nevertheless, I am not suggesting that Congress should take immediate action to create additional judgeships for these courts. What I do suggest is that the issue should be the subject of public discussion. The Biennial Survey of Judgeship Needs conducted by the Judicial Conference provides a perfect opportunity—or rather, it would do if the process were more open.

III. PROCESS AND ACCOUNTABILITY

The omission of the Fifth and Eleventh Circuits Courts of Appeals from the Judicial Conference judgeship request is troubling in itself. What makes it more so, in my view, are issues of process and accountability.

The Fifth and Eleventh Circuits have opted, quite self-consciously, to deal with caseload growth by accepting ever-increasing workloads for individual judges and by cutting back on the traditional elements of the appellate process. That is as much a policy choice as deciding whether or not to divide the Ninth Circuit.[9] The latter issue has been the subject of public debate for many years. Law review articles, news stories, and op-ed pieces have focused on every aspect of the Ninth Circuit's work. Less than a year ago, this Subcommittee held a hearing on the Ninth Circuit Court of Appeals Reorganization Act. In contrast, the counterpart issues in the Fifth and Eleventh Circuits remain invisible. The policy decision by those courts to remain "small" has occasioned virtually no public discussion and almost certainly is unknown to the vast majority of lawyers and other interested citizens in the region.

I recognize that the high profile of the Ninth Circuit results to some degree from controversies that have nothing to do with judicial administration. But I also believe that the absence of debate about the Fifth and Eleventh Circuits can be attributed in part to the process followed by the Judicial Conference of the United States in formulating the judgeship requests that it submits to Congress. There are two aspects of the process that are problematic in isolation; they are even more so when one considers their combined effect.

First, the process takes place entirely within the confines of the judiciary. For example, the request for 7 additional judgeships for the Ninth Circuit Court of Appeals was considered by the members of that court, by the Judicial Council of the Ninth Circuit (a body that is composed only of judges), and by the Judicial Conference of the United States and its committees. No one else had an opportunity to express views, to question assumptions, or to seek additional justifications or explanations for the conclusions reached at the various stages of the process. Until the Judicial Conference issued its press release on March 18, 2003, only a handful of people outside the judiciary knew that a recommendation was being considered. Even then, no details were forthcoming. Although the Judicial Conference supported its recommendation with a cogent, in-depth analysis, almost no one has seen that documentation.

Second, under the current system, if a majority of the active judges of a circuit prefer to keep their court 'small," that determination stands as an absolute barrier to any consideration of the possible need for new judgeships for that court. This "triggerlock" manifests itself in several ways. If a court, in response to the initial query from the Statistics Subcommittee, requests no additional judgeships, the trail of documentation ceases. Not only is there no public discussion; there is no discussion even within the Judicial Conference and its committees. The impressive compilation of data and analysis that accompanies a recommendation for new judgeships has no counterpart for the circuits that do not seek new judgeships, whether or not the Judicial Conference standard suggests that new judgeships are warranted.

A particularly unfortunate aspect of the current system is that if a majority of the judges on a court do not initiate a request for additional judgeships, Congress has no opportunity to hear from members of the court who take a different view. For example, Judge Carolyn Dineen King of the Fifth Circuit made clear in 1992 that she thought her court needed additional judges.[10] Since that time, adjusted filings in the Fifth Circuit have increased more than 12%.[11] Almost certainly, Judge

[9] Judge King put the matter more strongly. She said: "[W]hen Congress acquiesces in a decision by a court not to add judges and when, by any normal measures, more judges are needed, Congress is itself making a decision as to the kind of justice that the court will dispense." King, supra note 7, at 962.

[10] See King, supra note 7, at 962.

[11] It is not possible to use the current formula to calculate adjusted filings before 1993 because that is the first year in which the Administrative Office published data on pro se appeals. Adjusted filings in the Fifth Circuit increased 12% from 1993 to 2002.

King continues to believe that additional judgeships are needed for her court.[12] But there is no hint of that view in the materials the Judicial Conference submitted to Congress.

I believe that a more open process would provide more of the information that Congress should have to effectively carry out its responsibility for creating judgeships when needed. A more open process would also aid the judiciary in achieving its policy objectives.

I offer two principal suggestions. First, the process should be made more public, with an opportunity for participation by interested members of the legal community. Second, a negative response by a majority of active judges on a court of appeals to the initial query from the Subcommittee on Statistics should not stand as an absolute barrier to consideration of new judgeships for court.

Here is a sketch of how a revised process might work. The description refers to the formulation of judgeship requests for the courts of appeals. However, the proposal could be modified for use at the district court level also.

1. A provisional response. The process would begin, as it does today, with a request from the Subcommittee on Statistics asking individual courts to evaluate their need for additional judgeships or for the filling of vacancies. Each court would prepare its response, as is done now. However, instead of sending a final response to the Subcommittee, the court would prepare a draft response. The draft would be posted on the court's web site along with an announcement inviting comments from bar associations and interested citizens.

2. Explanatory material. To supplement its draft response, the court would post (or link to) material that would help outsiders to assess the court's provisional conclusions. This material would include:

- a description of the Judicial Conference process, including the numerical standard and other criteria used in evaluating court requests;
- information about the workload and case management practices of the particular circuit;
- the comparative statistical profiles that are now made available to the courts to help in formulating their requests; and
- other comparative data that would give members of the legal community a perspective on the practices of the particular circuit.

But most of the material would be explanatory. Thus, if the court is requesting additional judgeships, it would provide the justification, included the anticipated consequences for the judiciary and for litigants if the request is not met. In the unlikely event that the court's request is not supported by the standard of 500 adjusted filings, the court would explain why the standard is inapplicable.

If the court's workload statistics appear to justify an increase in the number of judgeships, but the court is not requesting any new positions, the court would set out the factors that influenced its decision. For example, are the contributions of senior or visiting judges so extensive as to offset the excessive workload? Do statistics overstate the true burdens on the judges because of the nature of the cases? Or does the court oppose any increase in size, irrespective of other considerations?

3. Inclusion of competing views. If the judges are divided in their views, both positions should be reflected in the court's response. I would not insist that the court identify the judges taking the competing positions, or even that it give the numerical division. (My own preference would be to provide that information, but I can understand why judges might view this as personalizing the controversy—for example, if the chief judge is a member of the minority within the court.)

4. Opportunity to comment. Interested persons and organizations would be given 60 days, perhaps 90 or even 120, in which to submit their comments. Ideally, comments would be posted on the court's web site as they are received, so that others can agree or disagree.

5. Final response. At the end of the comment period, the court would reconsider its position in light of the comments and formulate a final version of its response. This final version (including minority views within the court) would go to the Statis-

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[12] As it happens, Judge King is now chair of the Judicial Conference's executive committee. In March 2003, she offered some telling comments in support of the Conference's recommendations for additional appellate judgeships. She noted that circuit judges must often write 225 to 250 opinions a year; they must also sign on to another 450 opinions authored by other panel members. The judges can carry such a workload, Judge King said, only by "heavy reliance on staff and by writing shorter opinions, often a one-line opinion saying 'affirmed.'" Under those circumstances, she added, holding judges accountable is difficult. See David F. Pike, Judicial Conference Requests Help for Busy Bench Officers, Daily Journal, Mar. 19, 2003. The figures cited by Judge King suggest that she was referring to her own court.

tics Subcommittee along with a summary of the comments received. This material too would be posted on the court's web site. Thereafter, the process would follow the course it does today, with two important differences.

6. No "triggerlock." First, the absence of a request supported by a majority of the active judges would not necessarily stand as an absolute barrier to consideration of a possible recommendation for additional judgeships. For example, if adjusted filings are well above the standard, and a substantial minority within the court believes that additional judgeships are needed, a recommendation might be forthcoming. I doubt this would happen often, but it is at least possible that the minority's arguments will be more persuasive (to the Judicial Conference or to Congress) than those of the majority.

7. Public announcements. Second, the conclusions and recommendations at each later stage of the Judicial Conference process would be posted on the web sites of the particular court and of the Federal Judiciary. Even though there would be no formal opportunity for further comment, there is no reason why interested members of the legal community should not know how the Judicial Conference is dealing with these important issues. Further, on rare occasions, outsiders may have useful information or insights that will assist the Conference at the next step of the process.

I can anticipate three objections to this proposal. First, it will be said that a public comment period would prolong the process through which judgeship requests are developed. That is probably true, though it may be possible to compress some existing stages and thus keep the schedule close to what it is today. In any event, Congress has not been acting on judgeship requests every two years, or even every four years. If the consequence is to establish a three- or four-year cycle, that may be no more than bowing to reality. Unexpected surges in caseload in particular courts can always be dealt with through special requests and court-specific legislation, as in the 2002 Department of Justice Authorization Act.

Second, it will be argued that very few members of the legal community have any interest in the details of judgeship needs. Perhaps so, but the value of comments lies not in their quantity but in their quality. Bar associations in several circuits have an admirable history of thoughtful participation in debates over court structure and process. Moreover, a paucity of comments could itself be significant. Specifically, if lawyers of the Fifth and Eleventh Circuits, after being fully informed about how their courts of appeals have chosen to cope with the demands of increased caseload, voice no objection, Congress might well view that as strong evidence that the status quo is acceptable.

Third, it may be said that the proposed system would add to the burdens of the judges who take part in the process. But the principal changes involve publicizing material that is already prepared for a limited audience and listening to comments from interested persons outside the judiciary. These strike me as rather modest burdens.

On the other side of the balance, I believe that making the process more open and allowing broader participation would have three important benefits.

First, Congress would get more of the information that it needs to effectively carry out its constitutional responsibilities for the administration of justice in the federal courts. This information would not be limited to the consideration of judgeship requests; it would also aid Congress in dealing with a wide range of legislative issues, including modification of court structure and allocation of resources.

Second, the judges would get information that would help them in making the policy judgments that fall within the province of the judiciary. Judgeship requests implicate every aspect of court operations, particularly the use of non-Article III personnel and the various forms of interaction with litigants, lawyers, and citizens. Comments from the legal community on a court's provisional response to the Statistics Subcommittee would illuminate these issues and assist the courts in designing rules and internal operating procedures.

Finally, by involving the legal community in the formulation of judgeship requests, the courts can build a constituency that will help them in gaining support for their initiatives in Congress. For example, the documentation that the Judicial Conference has submitted in connection with its judgeship recommendations stands as a powerful argument for additional resources. I am confident that local bar associations and others in the legal community would use their influence to assist the judiciary in securing those resources—if they knew about the need and had participated in the process that led to the requests.

IV. CONCLUSION

I share the view expressed in the Long Range Plan for the Federal Courts that "[t]he growth of the Article III judiciary should be carefully controlled so that the

creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction." But the caseload of the courts continues to grow, and Congress continues to add to their jurisdiction. If we wish to maintain the quality of the justice administered by the courts, there is no alternative but to create some new judgeships. I urge the Subcommittee to support the modest request approved by the Judicial Conference in March 2003. I also urge the Conference to consider modifications of its process that will allow for broader participation in the formulation of judgeship requests. A more open process will benefit not only Congress but the judiciary itself.

EXECUTIVE SUMMARY

I. The Judicial Conference Request

The Judicial Conference of the United States has asked Congress to create 11 new judgeships for the federal courts of appeals (as well as 46 judgeships for the district courts). This request deserves the support of the Subcommittee for two reasons. First, the process followed by the Judicial Conference assures that a request will not be submitted to Congress unless there is strong evidence of the need for additional judgeships in the particular court. Second, my research on the work of the federal appellate courts leaves no doubt in my mind that additional judgeships are warranted.

A report submitted by the General Accounting Office (GAO) suggests fine-tuning the measure of "adjusted case filings" used by the Judicial Conference in formulating judgeship recommendations. In my view, however, what is needed is not greater precision in the statistics, but rather a wider range of non-quantitative information, including the views of lawyers and other citizens.

II. The Missing Circuits

The two courts of appeals that have the highest adjusted filings are those of the Fifth and Eleventh Circuits. However, the Judicial Conference has not requested a single new judgeship for either court. The explanation is that the Conference will not recommend any additional judgeships for a court of appeals unless a majority of the active judges of the court submit a request.

The Fifth and Eleventh Circuits have steadfastly resisted any increase in the size of their courts. Instead, they have opted to deal with caseload growth by accepting ever-increasing workloads for individual judges and by cutting back on the traditional elements of appellate adjudication. This is a policy choice that runs the risk of compromising "the appearance of legitimacy of the appellate process [and] the quality of appellate justice." But it is a policy choice that has occasioned almost no public discussion.

III. Process and Accountability

The process now used by the Judicial Conference in formulating its judgeship recommendations is not as useful to Congress as it could be. First, the process should be made more public, with an opportunity for participation by interested members of the legal community. Second, a negative response by a majority of active judges on a court of appeals to the initial query from the Subcommittee on Statistics should not stand as an absolute barrier to consideration of new judgeships for court. A more open process would provide significant benefits to the judiciary as well as to Congress.

Mr. SMITH. Thank you, Professor Hellman.

Judge Jacobs, let me direct my first question to you, and it is this: wouldn't it be a good idea for the Judicial Conference to implement the methodology recommended by the GAO, and take into more consideration the actual time spent on cases by judges, the so-called judge time. That's the methodology that they recommended so far that's not actually been followed by the Judicial Conference, and I'm wondering if that's something we could hope to expect?

Judge JACOBS. Well, as I understand the critique of the GAO, it doesn't bear upon the present request. It bears upon how we are going to go about reframing and reforming and updating our workload statistics in the future. I believe that the salient critique of

the GAO of the data that has been relied upon to arrive at the recommendations contained in the draft bill, is that the data is old, that the study, the time study that was used to generate those numbers——

Mr. SMITH. In regard to the District Judges they made the point that it was just old. In regard to the appellate judges they made the point that it wasn't objective and wasn't reliable.

Judge JACOBS. Yes. I would be happy to address the circuit judge issues as well, if you like. It has been a perennial goal to try to find some way of adjusting workloads or counting for workloads within Circuit Courts of Appeals, and it seems to me you're certainly entitled to an answer of why we have not done so. It's not just that it's difficult. The difficulty of any given appeal doesn't really turn on the nature of the case. It turns more on the fact that there is an issue for appeal. An extremely complex, difficult, vexed issue that is the subject of a circuit split can easily arise (indeed, can just as easily arise) in what might otherwise be deemed a garden variety challenge to a drug conviction as it can in an antitrust case, which would entail tremendous efforts in the district court, but not tremendous efforts in the circuit court.

In the circuit court the level of activity that any given appeal entails depends much more on whether there is a district court opinion, for example, and how good that opinion is. In my circuit I'm happy to say it's usually quite good indeed, though not always. It depends on whether the question presented on the appeal is the subject of settled law. Has our circuit decided the question, or is it a circuit split on the other hand? Are we weighing in or creating a circuit split. It depends on the likelihood of there being an en banc created by it. It depends on whether members of the panel agree, and I think the key thing about—that explains, I hope, why it really isn't feasible in my view to give particular cases particular weight based on the type of appeal it is, that is to say, on the underlying case.

Mr. SMITH. Thank you, Judge Jacobs.

Director Jenkins, two questions really. Are you persuaded by what Judge Jacobs says as far as it being more complex and taking into consideration more things than just the actual time spent by judges on particular cases?

And my second question is, what did you think of Professor Hellman's suggestion for a more open process?

Mr. JENKINS. With regard to the Courts of Appeals, it is more complex than a single judge deciding a case in a district court. The district court, I would point out however, that the district court case weights to an extent do take account of differences in the way that the district courts handle cases. Some, for example, district courts use magistrates more extensively than others, and that's reflected in the amount of time that was recorded in the study. So indirectly, the amount of time that district judges spend on cases, it does reflect differences in case processing within the 94 districts. It is a little bit more complex I think within the Courts of Appeals. They vary tremendously, for example, in how they use staff attorneys and the extent to which they use oral argument. Those kinds of things definitely do affect judge time. It is, however, from my perspective and our perspective as an institution, difficult to under-

stand why something more precise than adjusted case filings has not been developed. It's very difficult, as we say, neither the Judiciary nor we have a means of assessing how accurate that measure is. It may be very accurate, it may be very inaccurate. There's simply no way to know how accurate that is as a case related workload measure for the Courts of Appeals.

Mr. SMITH. Thank you, Director Jenkins. In a few minutes I'll ask again my question about your comments on Professor Hellman's recommendation, but let me come back to that a little bit later on.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Thank you very much, Mr. Chairman.

Judge Jacobs, you touched on it, but I would like you to develop it a little bit more. The methodology for the circuit courts count every case except pro se cases equally, should I understand it. The methodology for the district courts assigns cases a wide variety of values based on the time consumed in hearing those cases. Explain a little more the different methods for determining case loads. Wouldn't an Appeals Court typically spend more time on a case that raised constitutional issues than on one that challenged a trial court's finding of fact under a standard that gives tremendous deference to the trial court?

Judge JACOBS. Yes. I think that there are different standards, and levels of deference certainly involve different levels of work. But I think that the nature of the record is a very important thing. In the District Courts you could almost weigh the difference between different kinds of cases. You could use a wheelbarrow to bring in a complex contracts case. You might need a building, a floor, to house the documents from an antitrust case, and the district judge must deal with lawyers for each of these parties, must deal with (sometimes) myriad issues of evidence, myriad issues concerning the jury charge, and so forth. And so the complexity of cases suggested by type is a distinct and predictable variable for district judges.

For circuit judges, the question itself, the appellate question, can be bedeviling whether it is a antitrust case or a sentencing in a drug case, or almost anything else. It's very, very difficult to tell.

And I should add one other thing, which is that in coming up with case weights for circuit courts, there's an additional problem. Everything I listed is a problem that every circuit court would experience. But there are very big differences between circuit courts. It's often said that the D.C. Circuit has a special and unusual case mix, which I think is true mainly because they take a lot of administrative cases that involve the construal of new regulations and often in things that involve huge filings from the Federal Energy Regulatory Commission and other things, but the circuit courts differ one from the other in many other ways. They differ because we all sit on panels. And because we sit on panels, it matters if the Court is ideologically divided. It matters if the judges get along with each other, frankly; and there are other considerations like that that are very important, and that affect how judges arrive at a just result in each case. Some courts have many en banc proceedings. My court, for example, has very few.

Very large courts, for example, may proceed where one judge may not sit with another judge for a whole year, whereas in smaller courts like the First Circuit or the Second Circuit, we all sit with each other, and we all know each other, and we all deal with each other, and we all understand each other better.

I hope that's not a disjointed response to your probing question.

Mr. BERMAN. No. One last question.

As I understand the weighted caseload methodology employed by the Judicial Conference, it gives large, multiparty civil cases the same weight as a single plaintiff and single defendant cases. Should the caseload methodology, again for the district judges, be altered to account for these differences, or does the Judicial Conference use some other mechanism to take these differences into account?

Judge JACOBS. Well, there are of course some huge cases that involve thousands and thousands of plaintiffs, and we will usually look case by case at matters like that to see whether this is a district in which many such cases are arising. But it's sometimes worth keeping in mind that you can have hundreds of plaintiffs represented by one counsel. And you can have many defendants and have the same interest: They're from the same industry; they are fighting the same issues. It is often one of the signal responsibilities of a district judge to try to organize a large case so that it does not monopolize the time of a court. It is true that with certain kinds of civil cases, we're looking at an average, and an average will take in cases that are simpler, both because the issue is simpler and because the issue is more complicated in cases in which there may just be one party on each side, in cases in which there are multiple parties.

Mr. BERMAN. Mr. Chairman, I am concluded. I am resisting the temptation to explore the impact on judicial caseload from class action and medical malpractice legal reform. I don't know if——

Mr. SMITH. It would be minimal, I'm sure, Mr. Berman. Thank you, Mr. Berman.

The gentlewoman from Pennsylvania, Ms. Hart, is recognized for her questions.

Ms. HART. I'm actually interested in the proposal that Professor Hellman has to change the system, and I had a chance to read through a little bit of the longer testimony. I'm interested in knowing, I guess, first of all, the whole issue of getting a majority of the members of that circuit to actually request an additional judge. Is that actually the requirement as it is that everyone follows? I see nodding.

Judge JACOBS. Yes.

Ms. HART. That's the case actually now as it is.

Judge JACOBS. Yes.

Ms. HART. So that—I'm going to paint a scenario because I'm a political person. Say, for example, you have a circuit full of Democrats. Okay, say you have a circuit full of Republicans and the President is a Democrat. Could it be, could it ever happen that the judges might perhaps not want an additional judge while that person is President?

Judge JACOBS. I don't think so, and the reason is, with due respect, that Congress creates—has a comprehensive judgeship bill so

rarely. I know that in my court we voted to add two judges to our ranks some years ago when the President was a Democrat. We adhere to it now that the President is a Republican. I don't think it's possible to have that kind of fine tuning because the process takes a long time and notoriously——

Ms. HART. Because at the time it was urgently proposed. You mean the process to actually have that judge happen takes——

Judge JACOBS. Yes, yes.

Ms. HART. Like how long on the average from the time that it's first discussed to the time that it would actually happen?

Judge JACOBS. Well, we operate in 2-year cycles.

Ms. HART. Okay.

Judge JACOBS. On the other hand, most of the judgeships that we are seeking have been sought for several 2-year cycles. Unless there is a—there have been 34 judgeships created in recent years, and that has reduced the need, but I have seen—and I've been at this now for about 6 years—I have seen no oscillation between whether a court wants more people or doesn't want more people based on the partisan affiliation of the judges (who are none of them supposed to have any partisan affiliation anyway).

Ms. HART. Would either one of the other witnesses have any comment on that? Professor Hellman?

Mr. HELLMAN. I would like to add something. I agree with Judge Jacobs on that. In fact, some evidence of that, one of the circuits that is most strongly opposed and one of the judges who's most strongly opposed to adding judgeships is now former Chief Judge Wilkinson of the Fourth Circuit, and he took that position when President Clinton was in office, and he continued to take the position now.

So I should emphasize that I don't think that the present system is the result of any kind of political considerations. I think specifically to the Fifth and Eleventh Circuits, I think the judges of those circuits sincerely believe that their way of doing things is fine, and that they don't need the judgeships.

So I disagree from the outside with that judgment, and my suggestion is that it would be good if more people could see and hear here why they think this.

Ms. HART. That makes sense. On that issue, I'm always in favor of more openness and I think your idea just intellectually is a smart way to go, but also in light of the fact that we are working on things that would change jurisdiction or increase the burden to the courts, for example, the class action reform that we just passed here in the House. Is that perhaps another maybe more compelling reason to go with another—more input I guess from the public.

First I guess, before I go with that question, would either of the other two witnesses be opposed to an idea that would include more public input in the process?

Mr. JENKINS. We don't have any opinion on that.

Ms. HART. Okay.

Judge JACOBS. I've had some discussions on this provocative subject with Professor Hellman and I think it may be very useful to solicit views of bar associations on this subject, possibly within the context of this otherwise jam packed 2-year process, but possibly independently.

Ms. HART. Okay. Since you both answered it the way I was hoping, I will have no further questions.

Thanks, Mr. Chairman.

Mr. SMITH. Thank you, Ms. Hart.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

And I was sitting here waiting to ask the question about in terms of the request, have you anticipated the expanded jurisdiction that various proposals which have been passed by the House would mean in terms of the caseload? And let me direct that to Judge Jacobs.

But in addition to that, I'll follow up on something that Congresswoman Hart spoke about, and I tend to agree with Professor Hellman. I mean the issue here really is rather than a majority of justices required before a request is submitted, I would hope that there would be different criteria that prompt and timely justice would be the criterion as opposed to, you know, for whatever reasons judges may or may not think it appropriate, I mean, I would hope that the system is there to serve the consumer as opposed to the judges. That's just simply an observation, and I would support the suggestion by Professor Hellman. Maybe myself and Congresswoman Hart can discuss it later.

But you know, we've been passing out of this particular Committee, despite objections by the Judicial Conference, a number of pieces of legislation. The most recent was alluded to by both the Ranking Member and Ms. Hart, the so-called Class Action Reform Act. In terms of your current request, presuming that the statute, the bill that has been passed through the House is enacted into law, I dare say there would be considerable expansion of Federal jurisdiction. We know what's happening in terms of the federalization of criminal laws. I think there was a task force that was chaired by the firmer Attorney General, Mr. Meese, that really decried that trend. Are we getting ourselves into a situation where the workload—I forgot who it was—maybe it was you, Judge Jacobs, that talked about, we're here, we know that there is a finite number. Well, I'm beginning to wonder is there a finite number? You know, we continue expanding your jurisdiction, I would, again using the criteria of prompt and speedy and timely justice, I would anticipate you're back here on a rather frequent basis. If you could comment.

Judge JACOBS. Surely. I mean, clearly expansions of Federal jurisdiction impose new burdens on the Federal Courts. It's very difficult to predict when that will kick in. It's difficult to predict which courts would be affected. It may be that the class action reform will work in such a way as to impose, pinpoint, tremendous burdens on individual courts or it may result in some spread out burden over many courts. We tend to—well, we always evaluate judgeship needs in terms of historical data. It may be recent history, but it is the past, and certainly it is the universal view among Federal judges that expansions of Federal jurisdiction should be done carefully and thoughtfully because it tends to increase the number of——

Mr. DELAHUNT. But your current request is not anticipatory, I take it?

Judge JACOBS. No, it is not, Congressman.

Mr. DELAHUNT. Thank you.

Mr. SMITH. Thank you, Mr. Delahunt.

I just have another question or two to ask you, and I'm not sure who to direct it to. Perhaps, Director Jenkins, I'll start with you, but also ask Judge Jacobs or Professor Hellman to comment as well.

As I understand it, around the country today there are around I think 47 vacancies that are unfilled for Federal Judges. Has that been factored into the recommendations of the Judicial Conference, or should they be, or have they been?

Judge JACOBS. They are not, because what we look at when we look at case weights, is the weight of filed cases per judgeship, whether it's filled or not filled. If one were to look at the caseloads in courts in need of new judges and consider what the weighted filings would be, if the present vacancies continued——

Mr. SMITH. I thought the weight filings were based upon the total authorized judges which would have included the vacancies.

Judge JACOBS. Yes, it does. It includes the vacancies.

Mr. SMITH. As soon as those vacancies are filled, suddenly your average caseload is going to go down.

Judge JACOBS. No, because the—each judgeship is not the judge filling the seat. It is the seat either filled by a judge or awaiting an arrival.

Mr. SMITH. Okay, I see. Any other comments, Director Jenkins, on that?

Mr. JENKINS. Well, it's true, and I think it's appropriate that they do it the way they do, which is the number of statutorily authorized positions is what these numbers are, whether they're filled or not, because it is useful I think in terms of looking at the effect on the courts of not filling vacancies, to look at the weighted case filings per active judgeship. That shows what the burden is on those judges that are actually handling the cases, that are there to work on the cases. But in terms of requesting additional judgeships, I think the way that they do it is correct because what they should be looking at is if we had all these positions filled, what would the workload be on the courts? And that is what they do.

Mr. SMITH. Thank you, Director Jenkins.

Judge Jacobs, a question I've been concerned about. Does the Judicial Conference try to do anything about—what's the euphemism—underachieving Federal judges? Some Federal judges work harder than other Federal judges, and we've all seen that and been aware of that. Is there anything done to try to increase the productivity of Federal Judges who perhaps are not performing at a level the Judicial Conference would like?

Judge JACOBS. We don't have data on that. I'm not sure how I'd go about developing that data. I tend to be surrounded by judges who work hard because they love their work and are immersed in it and enjoy it thoroughly. And, you know, I'm here seeking more judges for my court, but I love every minute of what I do.

Mr. SMITH. My question wasn't a reflection on either you or people you know.

Judge JACOBS. Of course.

Mr. SMITH. It was on observations of attorneys around the country, that not every Federal judge necessarily is working as hard as might be hoped.

Judge JACOBS. I believe that in the courts that we're talking about here where the workloads are very heavy, I would think there's a very substantial amount, speculation, but I would think there's a very substantial amount of community pressure by other judges for everybody to carry their load plus some more. Whether there are judges around the country who get to the golf links now and then, I don't know because I don't play golf, but I don't think that that impacts much on the particular needs that we're identifying here where the courts are as busy as can be.

Mr. SMITH. Thank you, Judge Jacobs.

Let me end, Professor Hellman, with a very non-serious question, and it is this: that last week I was leaving work, heading to McLean, VA, crossing the 14th Street Bridge, and I happened to be following a car, about a 10-year-old Buick that had several bumper stickers on it. One bumper sticker is one I have never seen before, would not have been able to imagine if given many years, and I was going to ask you to comment on it. The bumper sticker read: "Save America. Close Yale Law School." [Laughter.]

Mr. HELLMAN. I think that's one that I had better not comment on. You may be seeing more of them though.

Mr. SMITH. That was the first one. Like I said, couldn't imagine it, and was surprised to see it. But anyway, I'll let it go at that, and you're not requested to reply any more than you already have.

Let me thank all three of you for your contributions today and for helping us as we go forward with a new judge bill. We appreciate your being here. We also appreciate your expertise and your contribution. So thank you all.

We stand adjourned.

[Whereupon, at 2:52 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

We meet here today at a time when we are employing more full-time federal judges then at any other time in our nation's history. In fact, we currently have the lowest number of vacancies on the court in 13 years. I find it interesting that after years of blocking moderate Clinton appointees, the Republicans are now attempting to steam roll through Congress a series of controversial right wing appointments onto the federal bench. I have always supported improving the federal court system. But, I want to ensure that the Judicial Conference's work is not used as a tool by the Republicans to pack the federal courts with right wing ideologues.

The public has been made to believe that the Democrats are to blame for the vacancies in the federal courts in effort to avoid debate about highly controversial nominees. The reality of the matter is that Republicans were actually responsible for using political tactics to create these vacancies. In the last two years, 123 of the President's judicial nominees will have been confirmed. By contrast, during the six and one-half years that the Republicans controlled the Senate under President Clinton, the Senate averaged only 38 confirmations a year. Indeed, Republicans blocked up or down votes on more then 60 of President Clinton's judicial nominees. Now that the Senate has filled 60% of the vacancies in the federal court, I will not tolerate Republicans efforts to try to speed through highly-conservative judicial nominees by placing blame on the Democrats.

I would also hope that if we do need to create more federal judgeships that we make sure we are addressing a real need. The GAO report has raised some questions about the methodology used by the Judicial Conference. I understand that the Judicial Conference is currently working on updating its research design. It would be valuable for us to allow them some time to improve their methodology before we consider adding more federal judgeships.

In this highly politicized climate we need to be weary of attempts to transform the federal judiciary. We need to ensure that our judiciary maintains its independence and never becomes the pawn of a political party. The importance of yesterday's affirmative action decisions illustrates this point. With this in mind, I hope that we can work together to gain a greater understanding of the needs of our federal judicial system. This hearing provides a valuable opportunity for us to work towards finding the most accurate way to assess the need for additional judges.

PREPARED STATEMENT OF THE HONORABLE DOUG BEREUTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Chairman Smith, Ranking Member Berman, and Members of the Subcommittee: Thank you for the opportunity to submit testimony today for this hearing on the Judicial Conference judgeship recommendations. Of course this is a very important and even critical issue to my state of Nebraska.

Nebraska has one Federal District Court temporary judgeship that is scheduled to expire in November 2003. On the first day of the 108th Congress I introduced legislation (H.R. 29) to make that temporary judgeship permanent which would represent a fourth judge for Nebraska. In addition, as you know, the Judicial Conference has recommended that this action be taken. The Senate recently passed legislation that included Nebraska in the list of judgeships to be made permanent.

Nebraska is experiencing a rapidly increasing problem with methamphetamine that mostly is being prosecuted on the Federal level. In fact, I would say that meth-

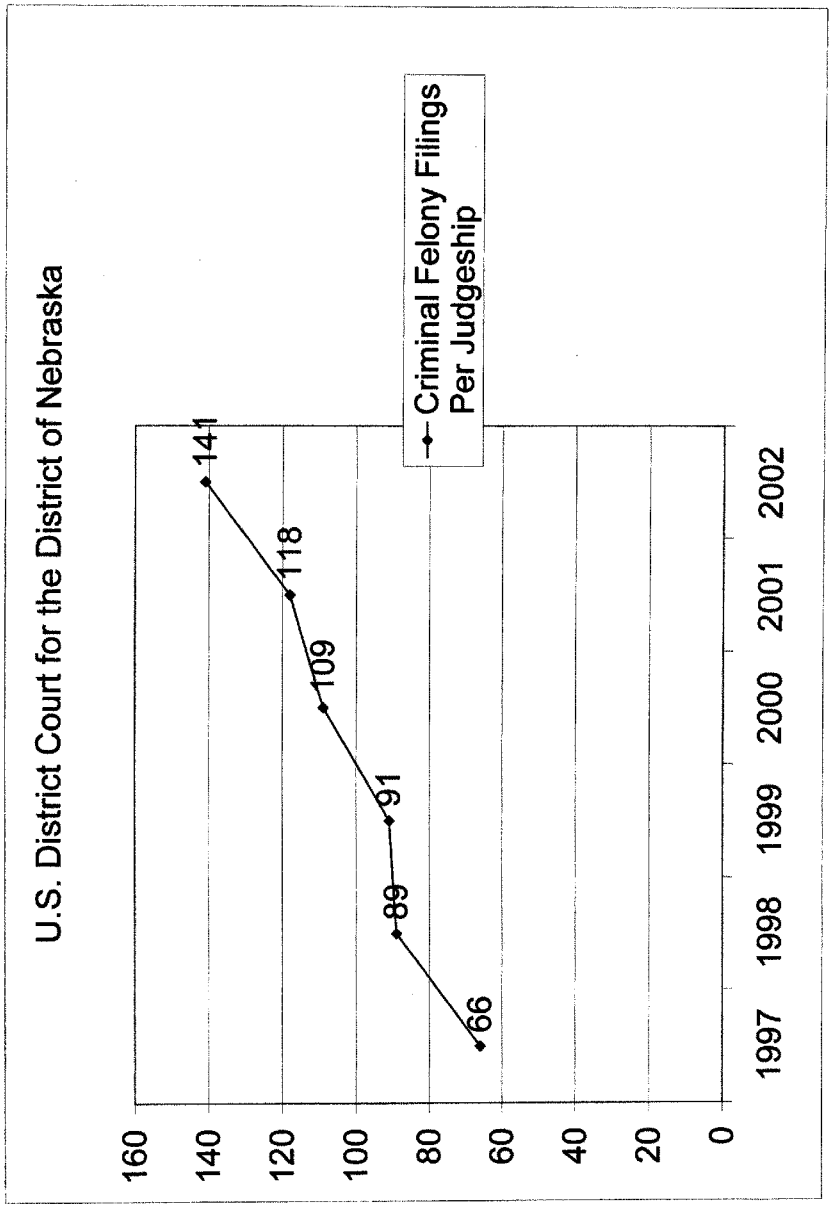
amphetamine use has become a plague in my state. As a result, the already great burden on our Federal court system is becoming more and more difficult. For example, according to numbers for the year 2002 from the Judicial Conference Administrative Office—Statistic Division, on the national level 36 percent of cases activated are related to drugs. *In Nebraska, that number is 64 percent.* Within the 8th Circuit, the next highest percent of drug related cases is in the Iowa-South District with 49.7 percent. *According to District of Nebraska records, 75 percent of defendants charged with a drug crime are charged in methamphetamine related offenses.* This problem is only getting worse.

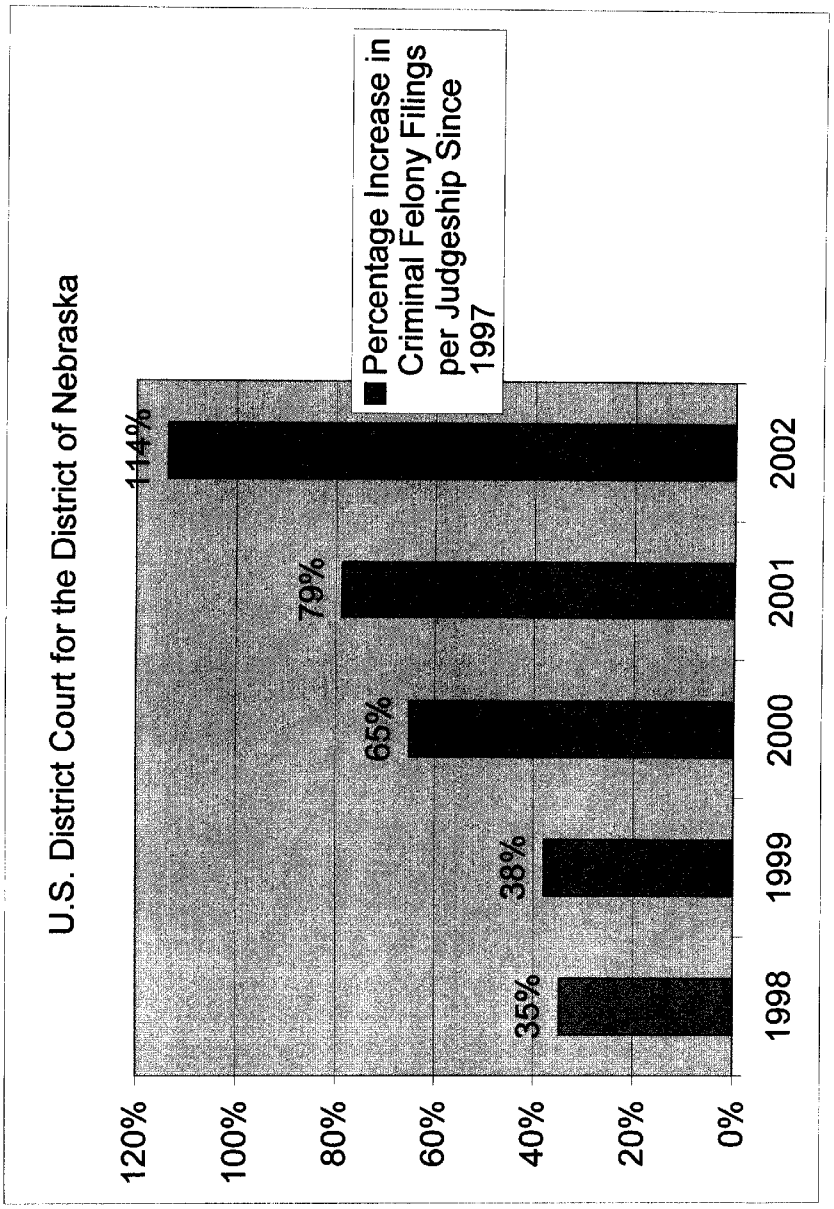
It is interesting to note that in total cases activated, Nebraska is tied for second most within the 8th Circuit with the Missouri-West District with 754 cases each, with only the Missouri-East District having more at 1,096. In 2001, Nebraska had 635 activated cases. In fact, Nebraska has experienced a 19 percent growth rate in the number of case activations in 2002.

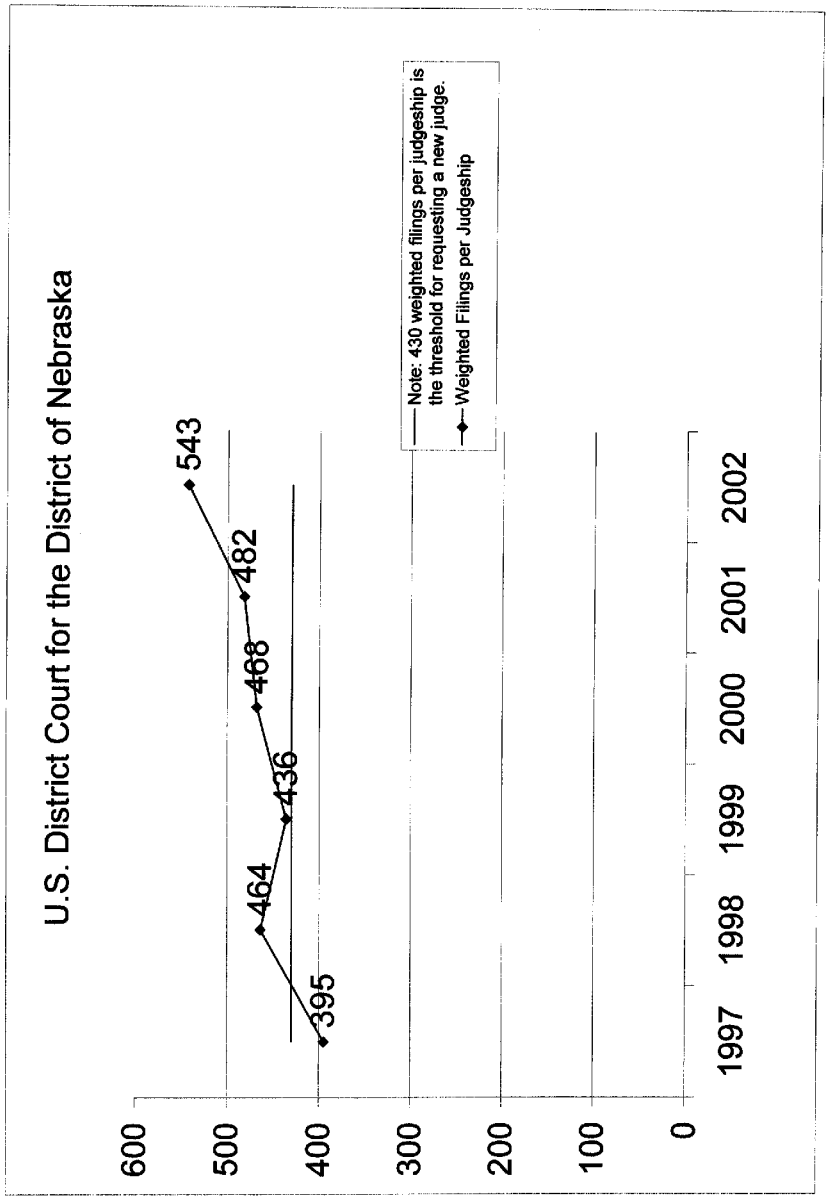
In the event that the District of Nebraska loses the temporary judgeship, the weighted filings per judgeship for 2002 would be 724 filings while, as you know, the threshold for the weighted filings per judgeship for requesting a new judge is 430. Even including the temporary judgeship, the weighted filings in 2002 were 543 cases.

I have attached a few charts that I think clearly show how critical the fourth judge is to the Nebraska District. With the growing number of overall cases facing the Nebraska District and the growing crime level related to methamphetamine manufacture, trafficking and use, it is imperative that the temporary judgeship be made permanent.

In closing, I urge the Subcommittee include the provisions of H.R. 29 in any legislation regarding changes in Federal judgeships. Thank you again for this opportunity to submit testimony on this important issue.


U.S. District Court for the District of Nebraska
Criminal Felony Filings Per Judgeship
141
118
109
91
89
66
160
140
120
100
80
60
40
20
0
1997
1998
1999
2000
2001
2002


U.S. District Court for the District of Nebraska
Percentage Increase in Criminal Felony Filings per Judgeship Since 1997
120%
100%
80%
60%
40%
20%
0%
35%
38%
65%
79%
114%
1998
1999
2000
2001
2002


U.S. District Court for the District of Nebraska
Note: 430 weighted filings per judgeship is the threshold for requesting a new judge.
Weighted Filings per Judgeship
543
482
468
436
464
395
600
500
400
300
200
100
0
1997
1998
1999
2000
2001
2002

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

NEBRASKA			12-MONTH PERIOD ENDING SEPTEMBER 30						Numerical Standing	
			2002	2001	2000	1999	1998	1997	U.S.	Circuit
OVERALL CASELOAD STATISTICS	Filings*		1,739	1,500	1,487	1,329	1,479	1,369		
	Terminations		1,447	1,362	1,592	1,334	1,334	1,369		
	Pending		1,486	1,242	1,117	1,222	1,254	1,114		
	% Change in Total Filings	Over Last Year		15.9					24	3
		Over Earlier Years			16.9	30.9	17.6	27.0	17	3
Number of Judgeships			4	4	4	4	4	4		
Vacant Judgeship Months**			1.1	12.0	2.7	.0	.1	12.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	435	375	372	332	370	342	59	6
		Civil	261	257	263	241	281	276	77	8
		Criminal Felony	141	118	109	91	89	66	9	2
		Supervised Release Hearings**	33	-	-	-	-	-	13	2
	Pending Cases		372	311	279	306	314	279	53	5
	Weighted Filings**		543	482	468	436	464	395	26	3
	Terminations		362	341	398	334	334	342	71	8
	Trials Completed		21	23	27	32	35	29	35	7
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	7.6	8.2	8.0	11.0	9.1	9.4	47	6
		Civil**	10.4	9.7	11.1	11.8	11.0	11.7	66	5
	From Filing to Trial** (Civil Only)		22.0	18.4	21.3	21.4	20.0	21.5	47	5
OTHER	Civil Cases Over 3 Years Old**	Number	10	60	27	10	15	8		
		Percentage	1.0	6.6	3.3	1.1	1.6	.9	8	2
	Average Number of Felony Defendants Filed Per Case		1.4	1.4	1.4	1.4	1.5	1.4		
	Jurors	Avg. Present for Jury Selection	35.90	30.46	28.06	32.50	30.63	28.88		
		Percent Not Selected or Challenged	25.9	22.7	16.9	28.6	31.3	27.9		

2002 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1044	56	59	236	35	40	48	114	125	29	219	-	83
Criminal*	555	58	5	77	-	13	341	**	4	24	7	12	14

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.
** See "Explanation of Selected Terms."

FOR THE TWELVE MONTH PERIOD ENDING 12/31/02									
	DRUGS	Crimes of Violence	Immigration Cases	Weapons Firearms	Illegal Alien	Legal Alien		Cases Activated	Detention Rate
National	36%	5.20%	19.70%	7.50%	26.00%	6.80%		93,296	55.40%
8th Circuit								5,229	51.60%
AR,E	27.70%	9.90%	6.80%	13.70%	8.20%	0.70%		328	28.50%
AR,W	27.80%	5.70%	25.10%	6.70%	31.80%	6.70%		235	70.50%
IA,N	64.20%	2.80%	12.70%	8.00%	19.30%	4.00%		427	45.70%
IA,S	49.70%	5.00%	15.00%	9.30%	25.10%	3.20%		440	63.30%
MN	47.60%	11.30%	5.90%	5.50%	21.30%	5.90%		595	48.40%
MO,E	41.70%	3.50%	2.80%	13.20%	1.60%	0.10%		1,096	51.60%
MO,W	41.40%	4.10%	3.30%	27.50%	8.70%	2.80%		754	54.00%
Nebraska	64.00%	4.70%	8.50%	8.70%	23.50%	4.40%		754	58.90%
ND	19.40%	20.20%	10.50%	15.50%	17.80%	2.30%		261	43.60%
SD	23.80%	35.40%	5.30%	6.00%	7.00%	3.30%		400	43.00%
Drugs include Marihuana, Narcotics and Controlled Substances									
Crimes of Violence include Homicide, Robbery, Assault, Burglary and Sex Offenses									
District of Nebraska - U.S. Pretrial Services - February 6, 2003									

PREPARED STATEMENT OF THE HONORABLE TOM OSBORNE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Chairman Smith, Ranking Member Berman, and Members of the Subcommittee:

Thank you for allowing me the opportunity to submit testimony for today's hearing on the need for additional federal judges. Currently, Nebraska has three permanent and one temporary District Court Judge. If the temporary judgeship is not made permanent by November 20, 2003, the judgeship will expire after the first vacancy on the bench, so this is an urgent matter for the people of Nebraska.

Caseloads for U.S. district judges in Nebraska have climbed steadily largely because of an increasing number of criminal cases, particularly those related to drug trafficking. In fact, criminal cases have more than doubled since 1995. Like many other states in the Midwest, Nebraska has been plagued in recent years by an influx of methamphetamine (meth), and criminal cases involving meth represent 66 percent of Nebraska's drug docket, compared to the national average of 14.5 percent.

The influx of meth in Nebraska will continue to cause the criminal caseload to increase. In 2001, the number of meth defendants increased by 88 percent. Interstate 80, which runs the length of the state of Nebraska, is one of the primary transit routes used for drug trafficking across the central United States. This has contributed to Nebraska being ranked second in the number of high-level drug trafficking defendants indicted and convicted in the Central Region, which includes 12 states.

This substantial increase in Nebraska's criminal trials leaves Nebraska's federal judges with extremely heavy caseloads. In fact, Nebraska's judges carry a heavier criminal caseload than judges in New York City, Chicago, and Los Angeles. This fourth judgeship is critically important to Nebraska, and without it, criminal cases will move more slowly and handling civil cases will become increasingly burdensome.

My colleague from Nebraska, Mr. Bereuter, has introduced H.R. 29, to convert Nebraska's temporary judgeship for the district of Nebraska to a permanent judgeship. I am pleased to be an original cosponsor of this legislation and would appreciate H.R. 29 being included in any legislation the Subcommittee considers regarding federal judgeships. The Senate has already passed legislation that included Nebraska in the list of judgeships to be made permanent and I am hopeful the House will do the same.

PREPARED STATEMENT OF THE HONORABLE LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. Chairman, thank you and the rest of the members of the Subcommittee for considering legislation that would make the current temporary judgeship in Nebraska permanent. Nebraska currently has three permanent Federal District Court judgeships in addition to one temporary judgeship that is due to expire with the first vacancy after November 2003.

Mr. Chairman, Nebraska's Federal District Courts handle a heavy caseload, not unlike many Federal District Courts nationwide. However, Nebraska Federal District Court judges' criminal caseloads ranked them 9th of 94 Federal district courts as of September 2001. To help put this in perspective, the same study ranked the criminal caseloads of the Southern District of New York, which includes Manhattan and the Bronx, 79th of 94. Furthermore, the four active judges in Nebraska ranked 29th nationally in terms of trials completed. This means that Nebraska judges try an average of 23 cases per judge.

Due to Nebraska's increasing caseload, the Judicial Conference of the United States has recommended that Nebraska's temporary judgeship be made permanent. The Judicial Conference uses a weighted filing determination to determine which temporary judgeships should be made permanent. Currently, the District Court in Nebraska has over 480 weighted filings per judge, well above the Judicial Conference standard for requesting additional judgeships. Mr. Chairman, it is estimated that the loss of the temporary judgeship in Nebraska would raise the average of weighted filings per judge to more than 600, creating more aggravation for our already overburdened judges.

These numbers mean nothing unless they are put into a real life context. Mr. Chairman, Nebraska is a rural state and the judges must travel long distances in order to try cases. For example, judges in Omaha must travel almost 600 miles four times a year to conduct two-week jury sessions. Additionally, magistrates are sent out one month prior to the judge's arrival to conduct pretrial conferences on all

cases pending trial. All this travel takes its toll on these judges and forces them at times to use the services of judges from other districts.

Mr. Chairman, in addition to these rankings and mandatory travel our current judges may not be willing to serve much longer. Of the three permanent Federal district court judges, two are almost 80 years old and carry approximately 100 cases each. I think it is fair to say that these judges will not be able to maintain such caseloads for much longer. The third permanent judge will be eligible to retire in May of 2004 and since the authorization for the temporary judgeship expires in November 2003, this judge cannot be replaced unless this authorization is made permanent or extended.

I cannot stress enough the need to make this temporary judgeship permanent. I hope that the information I have provided is useful and I would like to once again thank you and the rest of the members of the subcommittee for your time and consideration of this important matter.

PREPARED STATEMENT OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. Chairman, I come before you today to bring attention to a situation affecting my district. The Northern District of Iowa is in need of an additional judge to help deal with the deluge of methamphetamine related cases in Iowa. Iowa has a serious meth problem. We need to bring offenders to justice.

As you may know, methamphetamine is a serious and growing problem in Iowa and across the nation. Drug cases, which comprise 49 percent of the criminal caseload, have increased 99 percent since 1999. This is due to the creation of two Organized Crime Drug Enforcement Task Forces, resulting in increased prosecutions of meth cases. An additional judge is needed to adjudicate these cases in a timely manner.

Not only are meth related cases on the rise, but other cases are also overburdening the case load. There is an urgent need for an additional judgeship for the Northern District of Iowa. An additional judge is needed due to increased criminal filings, a high trial rate and a very high number of contested sentencing hearings per judgeship. The Judicial Conference has recognized this need and has recommended an additional temporary judgeship for the Northern District of Iowa.

Given the insistence of various Committee members that any new judgeships will be authorized based on objective data, not political considerations, I believe the data which support the need for an additional judge is compelling. Overall filings have risen 35 percent since 1999. Criminal filings have more than doubled since 1999 to nearly 164 per judgeship. During the 2001 calendar year, the median time from filing to disposition for both civil and criminal cases was well above the national average. Completed trials have doubled in the past two years to more than 50 per judgeship in 2001, the highest total in the nation and more than twice the national average.

As you can see, the Northern District of Iowa has demonstrated a need for an additional judge. I ask for your consideration of their request.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF THE HONORABLE STEVAN E. PEARCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEX MEXICO

Mr. Chairman, Ranking Member Berman and Members of the Subcommittee, thank you for the opportunity to offer this statement on behalf of the Second Congressional District of New Mexico. I commend you, along with Chairman Sensenbrenner and Ranking Member Conyers for the commitment to ensure our constitutional duty as Members of Congress is fulfilled vigilantly and prudently.

The main concern I wish to convey to the Subcommittee today is the urgency for additional Federal District Judgeships in the United States District Court of New Mexico, specifically in the Las Cruces federal courthouse.

Crushing caseloads, unique geographical factors and the exhaustion of judicial resources manifests a desperate judicial situation. In March 2003, the Judicial Conference presented its recommendations for additional judgeships to Congress. Data from the Conference indicates the District has the *fourth* highest total criminal caseload per judgeship in the nation. This translates into 739 weighted cases per judgeship—46 percent higher than the national average and 72 percent higher than the standard the Conference uses to indicate the need for additional judgeships. Since 1996, the criminal caseload has increased by 150 percent. Moreover, Chief U.S. Dis-

trict Judge for the New Mexico District James A. Parker reports that since the Conference study was conducted, the number has risen to 784 weighted cases per judgeship. What is so alarming is the fact that the weighted criminal caseload per judgeship has dramatically increased despite the authorization of an additional judgeship in December 2000.

The exceptional caseload is primarily attributed to the geographical factors unique to the District and other border Districts. Immigration and narcotics cases are almost exclusively driving the increase—placing an extraordinary burden on the Las Cruces federal courthouse, which is just 50 miles away from the U.S.-Mexico border. In fact, two-thirds of all criminal cases in the District are now processed in Las Cruces. Immigration prosecutions currently account for 85 percent of all criminal cases in the District. Additionally, the amount of time in which these cases are adjudicated is increasing simultaneously with the caseload as the immigration cases predominantly require interpretation.

Due to the already high strain on judges in the Albuquerque and Santa Fe courts, the District has been unable to assign a permanent District Judge in Las Cruces. However, the court's need for additional judgeships in Las Cruces is not indicative of a lack of willingness on behalf the District Judges to actively address the increased caseload. While the District has made strident efforts, it has begun to exhaust all judicial resources. One option employed to handle the enormous caseload in Las Cruces is assigning rotating duties to District Judges from Albuquerque and Santa Fe. This means judges and their staffs must travel more than 450 miles round trip during the week, face extraordinary caseloads and return to their Chambers on the weekends to compensate for the time lost to duty in Las Cruces. Chief Judge of the New Mexico District James Parker completes this rotation in Las Cruces frequently and estimates he spends at least twelve hours per day on cases. Constant long travel and unusually long hours on cases are obviously wearing on the judges who must perform this duty.

The District also utilizes Magistrate Judges in Las Cruces to manage the crushing caseload. Magistrate Judge Lourdes Martínez is eager to assist with the District caseload, but states that, even though Magistrate Judges cannot hear felony trials or sentence defendants convicted of felony-level crimes, just handling pre-indictment pleas for the District requires Magistrate Judges to be on the bench everyday and every weekend of the year.

Many of the judges relied upon to handle the Las Cruces caseload are 10th Circuit Court of Appeals Judges or District Judges from other jurisdictions in the United States. U.S. District Judge William Sessions, assisting from Burlington, VT, spent two weeks in Las Cruces during February 2003 and concluded that Las Cruces is in desperate need of more than one full-time Article III judgeship. Within only two days, Judge Sessions sentenced more than 50 people. Judge Sessions has never seen a caseload as high as Las Cruces' in the eight years he has been on the bench.

U.S. District Judge Monti Belot, who has assisted in Las Cruces from Wichita, Kansas on three different occasions as late as April 2003, states there is no question there is a need for additional Article III judgeships in Las Cruces. Judge Belot contends there is no way to appreciate the volume of work and how well the Clerk's Office, U.S. Marshals, Public Defenders and U.S. Attorneys work together to handle the crushing caseload unless one actually sees it themselves.

The 21st Century Department of Justice Appropriations Authorization Act created one additional temporary judgeship for the District, who will reside in Las Cruces effective July 15, 2003. However, the Conference estimates the temporary judgeship will only reduce the District's caseload to 633 weighted cases per judgeship. Furthermore, as evidenced from the rotating duty and visiting judges' experiences, it would be a daunting task to have only one District Judgeship managing the entire criminal docket in Las Cruces. With the constant increase in cases, having only one District Judgeship in Las Cruces would not eliminate the need for judges to travel from other areas.

The Conference has recommended two permanent judgeships and one temporary judgeship for the District. The Conference contends the additional judgeships will decrease the weighted filings per judgeship to 470 from 739, bringing the District on parity with the rest of the Districts in the United States, and Las Cruces on parity with the rest of New Mexico in terms of caseload. I believe the current situation in the District illustrates the wisdom of including the recommended additional judgeships for the District in legislation the Judiciary Committee might approve. I appreciate the opportunity to bring to your attention the lack of judicial resources in my Congressional District and applaud the Subcommittee's eagerness to review the federal judgeship issue.